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CONSTITUTIONAL LAW — THE PREEMPTION DOCTRINE
— A Florida sales tax on aviation fuel purchased by foreign airlines for use exclusively in international traffic does not unconstitutionally impair the power of the federal government to regulate foreign commerce. *Wardair Canada Inc. v. Florida Dep't of Revenue*, 106 S. Ct. 2369 (1986).

For many years, Florida has imposed a tax on fuel purchased by airlines operating within its borders.¹ Prior to April, 1983, Florida prorated the sales tax applicable to air carriers on a mileage basis.² As such, an airline owed only the portion of the otherwise payable tax that represented the ratio of its Florida mileage to its worldwide mileage for the previous fiscal year.³ Because international air carriers traveled only briefly in Florida air space, they paid a small amount of state tax on fuel purchased in Florida.⁴

Effective April 1, 1983, the Florida legislature substantially amended its fuel tax scheme by repealing the mile-

¹ FLA. STAT. § 212.08(4) (1971). The tax was denominated as an excise tax imposed on the privilege of engaging in the business of selling tangible personal property, including fuel, rather than as a property tax or user fee. Although the tax was imposed upon the fuel supplier, the supplier was required by statute to pass the tax on to the purchaser as a sales tax. The purchaser ultimately bore the economic incidence of the tax. FLA. STAT. ANN. § 212.62(2) (West Supp. 1986).

² FLA. STAT. ANN. § 212.08(4) (West 1971).

³ *Id.* In approving the proration formula, the Florida Supreme Court stated that "Florida would only tax that portion of commerce activity that occurred within the state," thus preventing the state from "exceeding its powers to tax interstate and foreign commerce." *Tropical Shipping & Constr. Co. v. Askew*, 364 So. 2d 433, 435 (Fla. 1978) (statute providing for partial exemption for vehicles and vessels engaged in foreign commerce based on ratio of miles traveled within the state upheld).

⁴ Brief for the United States as Amicus Curiae at 5, *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 106 S. Ct. 2369 (1986) [hereinafter Amicus Curiae Brief].

age proration formula for airlines.⁵ The new amendment imposed a five percent fuel tax on all aviation fuel drawn from Florida storage facilities.⁶ The legislature fully taxed all fuel purchased in Florida regardless of whether it was used in intrastate, interstate or foreign commerce and provided no provisions for apportionment.⁷ The amendment substantially increased the tax liability of international carriers engaged exclusively in foreign commerce.⁸

Wardair Canada, a Canadian corporation operating round-trip international airline charter programs between Canada and the United States, was seriously affected by Florida's tax amendment.⁹ Wardair Canada regularly purchased significant quantities of aviation jet fuel in Florida for consumption by airplanes in international commerce en route from Miami.¹⁰ Wardair Canada claimed to be exempt from state taxes on aviation fuel by virtue of

⁵ FLA. STAT. ANN. § 212.08(4)(a)(2) (West Supp. 1986). The amendment left the proration formula in effect for railroads and vessels engaged in interstate or foreign commerce. *Id.*

⁶ FLA. STAT. ANN. § 212.62(3)(a)(3) (West Supp. 1986). The designated tax of \$1.148 per gallon was based on a calculated average price rather than the actual price per gallon of aviation kerosene, and resulted in a levy of 5.7 cents per gallon. *Id.* at § (3)(a)(2).

⁷ FLA. STAT. ANN. § 212.62(3)(a)(2) (West Supp. 1986). Wardair Canada initially asserted that the failure to provide for reasonable apportionment of the tax and to fairly relate the tax to services provided foreign airlines made the tax unconstitutional based on the test outlined in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1979). For a discussion of the *Complete Auto* test, see *infra* notes 81-83 and accompanying text.

⁸ Amicus Curiae Brief, *supra* note 4, at 5. Effective July 1, 1985, Florida further amended its taxation scheme to exempt aviation fuel from sales tax while imposing a new excise tax. The amount of the levy will remain approximately the same; however, the new excise tax applies to aviation fuel sold in the state or brought into the state for use. Air carriers may be eligible for a refund not to exceed six-tenths of one per cent of wages paid by the carrier to employees located within the state. FLA. STAT. ANN. § 206.9855 (West Supp. 1986). The refund provision provides little relief since few international carriers base employees in the state of Florida. Amicus Curiae Brief, *supra* note 4, at 5 n.4.

⁹ Amicus Curiae Brief, *supra* note 4, at 3-4. Wardair Canada operates under a CAB authorized foreign air carrier permit issued pursuant to 49 U.S.C. § 1372 (1982). Although Wardair did not engage in intrastate or interstate flights within the United States and scheduled service solely from Miami (a primary domestic gateway for foreign air traffic), it was subjected to the excise tax each time it purchased fuel within Florida. Amicus Curiae Brief, *supra* note 4, at 3-4.

¹⁰ Amicus Curiae Brief, *supra* note 4, at 4.

explicit provisions in the United States/Canadian Non-scheduled Airline Services Agreement¹¹ and by virtue of reciprocal tax exemptions provided to international air carriers by both the Chicago Convention¹² and the Federal Aviation Act.¹³

Wardair Canada sought declaratory and injunctive relief in circuit court against the application of Florida's fuel tax.¹⁴ Wardair contended that the tax was inconsistent with federal aviation policy as expressed in Article 24 of the Chicago Convention¹⁵ and Section 1502 of the Federal Aviation Act,¹⁶ and that the state-imposed tax was un-

¹¹ Nonscheduled Air Services Agreement, May 8, 1974, United States-Canada, 25 U.S.T. 787, T.I.A.S. No. 7826. In order for an international air carrier to operate air transportation within the United States, its home country must enter into a bilateral agreement with the United States government outlining the specific service to be provided, and receive authorization and permits. The term of the permit depends upon the continuation of the international bilateral agreement. The Nonscheduled Air Services Agreement governs charter airline service between the United States and Canada. For a discussion of the terms of the Agreement, see *infra* notes 116-123 and accompanying text.

¹² Convention on International Civil Aviation, *opened for signature* December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

¹³ Federal Aviation Act of 1958, 49 U.S.C. §§ 1301-1552 (1982). Wardair Canada relied specifically on Section 1502 of the Federal Aviation Act in its argument of an overarching federal policy of reciprocal tax exemptions for international air carriers. See *infra* notes 51-53 and accompanying text.

¹⁴ See *Florida Department of Revenue v. Wardair Canada, Ltd.*, 455 So. 2d 326 (Fla. 1984), *aff'd*, 106 S. Ct. 2369 (1986). Nineteen international airlines domiciled in North America, Central America, South America and the Caribbean also challenged the tax amendment in Leon County Circuit Court. The Second Circuit consolidated the cases, but issued its final judgment and opinion as to Wardair's action separate from the others. The judgment and opinions involving Wardair were appealed separately. *Id.* at 327.

¹⁵ Chicago Convention, *supra* note 12, art. 24(a) states in relevant part:

Aircraft on a flight to, from, or across the territory of another contracting State shall be admitted temporarily free of duty, subject to the customs regulations of the State. Fuel, lubricating oils, spare parts, regular equipment and aircraft stores on board an aircraft of a contracting State, on arrival in the territory of another contracting State and retained on board on leaving the territory of that State shall be exempt from customs duty, inspection fees, or similar national or local duties and charges.

(emphasis added).

¹⁶ 49 U.S.C. § 1502 (1982). For a discussion of the provisions of Section 1502, see *infra* notes 51-53 and accompanying text.

constitutional under both the Supremacy¹⁷ and foreign Commerce Clauses of the Constitution.¹⁸ The circuit court did not declare the tax unconstitutional, but found that the tax as applied to the airlines was inconsistent with the undertakings of the United States government in its executive bilateral agreements and accordingly granted a permanent injunction.¹⁹ The court stated that the "Federal Government must speak with one voice when regulating commercial relations with foreign governments,"²⁰ and that to allow the fifty states to impose individual state taxes would infringe upon federal power to regulate foreign commerce.²¹

Upon cross-appeals from the circuit court's judgment, the Florida District Court of Appeals certified the case directly to the Florida Supreme Court, which reversed the lower court's ruling.²² The Florida Supreme Court rejected Wardair Canada's Supremacy Clause argument that Florida's sales tax was preempted by the Nonscheduled Air Service Agreement.²³ The court found that the bilateral aviation agreement addressed only national taxes

¹⁷ U.S. CONST. art. VI, cl. 2. This clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

¹⁸ U.S. CONST. art. I, § 8, cl. 3. This clause states in relevant part: "Congress shall have Power . . . [t]o regulate Commerce with the foreign Nations. . ." *Id.*

¹⁹ See Florida Department of Revenue v. Wardair Canada, Ltd., 455 So. 2d at 327. The opinion of the Leon County circuit court is unreported. The circuit court recognized that the bilateral aviation agreements in evidence had been negotiated at various times over a 40 year period and dealt with fuel taxes in different terms, but that the agreements overall evidence a well-settled federal policy favoring reciprocal tax exemptions. This policy was designed to establish uniformity, to prevent retaliatory taxes and to further the free flow of international aviation. Amicus Curiae Brief, *supra* note 4, at 7.

²⁰ Amicus Curiae Brief, *supra* note 4, at 7 (quoting Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 436 (1979)). For a discussion of *Japan Line* in dormant Commerce Clause analysis, see *infra* notes 84-104 and accompanying text.

²¹ Amicus Curiae Brief, *supra* note 4, at 7.

²² Florida Department of Revenue v. Wardair Canada, Ltd., 455 So. 2d at 327.

²³ *Id.* at 328-29.

and did not preclude a state's power to tax.²⁴ In rejecting Wardair Canada's argument that Florida's excise tax violated the foreign Commerce Clause, the court held that Florida's tax neither created a substantial risk of international multiple taxation nor prevented the federal government from "speaking with one voice when regulating commercial relations with foreign governments."²⁵ Wardair Canada appealed to the United States Supreme Court which noted probable jurisdiction.²⁶ *Held, affirmed*: A Florida sales tax on aviation fuel purchased by foreign airlines for use exclusively in international traffic does not unconstitutionally impair the power of the federal government to regulate foreign commerce. *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 106 S. Ct. 2369 (1986).

I. LEGAL BACKGROUND

A. *The Preemption Doctrine*:

The Supremacy Clause²⁷ mandates that federal law overrides a state regulation where there is an actual conflict between the two sets of legislation.²⁸ In addition, where Congress acts pursuant to a plenary power, it may specifically prohibit parallel state legislation and thereby

²⁴ *Id.* at 329. The court also reasoned that competitive equality would be destroyed if United States carriers were required to pay state excise taxes on fuel purchases while Canadian carriers were exempted from such tax. *Id.*

²⁵ *Id.* (quoting *Japan Line*, 441 U.S. at 451). The court reasoned that Wardair had not made a de facto showing of the risk of multiple taxation. *Id.* The court also assumed that Congress intentionally limited the exemptions to national taxes, so that a state tax would not contradict federal policy. *Id.* For a discussion of the *Japan Line* test of the validity of a statute under dormant foreign Commerce Clause analysis, see *infra* notes 84-104 and accompanying text.

²⁶ *Wardair*, 106 S. Ct. at 2371-72. Jurisdiction of the United States Supreme Court was invoked under 28 U.S.C. § 1257(2) (1982). Under 28 U.S.C. § 1257(2), jurisdiction is invoked when a state court upholds a state statute against a contention of invalidity on federal grounds.

²⁷ U.S. CONST. art. VI, cl. 2. For a complete text of the Supremacy Clause, see *supra* note 17.

²⁸ *Hines v. Davidowitz*, 312 U.S. 52, 66 (1940) (Federal Alien Registration Act of 1940 precludes enforcement of Pennsylvania's Alien Registration Act of 1930 due to supremacy of national power in the general field of foreign policy).

occupy the field.²⁹ Although Congress seldom articulates a specific intent to preempt an entire field of regulation, it may impliedly occupy the field by demonstrating the requisite intent.³⁰ A court may infer intent from the pervasiveness of the federal scheme and the need for uniformity within the field.³¹ The judicial branch has shouldered the responsibility for discovering congressional intent and invalidating state laws which impermissibly interfere with the effectuation of congressional objectives.³²

At the center of the preemption argument is the issue of congressional intent.³³ The United States Supreme Court in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*³⁴ enunciated a test to apply in the absence of preemptive language.³⁵ According to *Pacific Gas*, congressional intent to supersede state law "may be found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it"³⁶ If the legislative history illustrates clear evidence of congressional intent to preserve dual regulation, however, the Court will not find the level of pervasiveness needed to justify federal preemption of

²⁹ *Id.* at 66-67. Congressional enactment of uniform national immigration laws occupied the field so as to preempt state regulation. *Id.*

³⁰ *Id.* There is a strong presumption favoring the validity of state regulation and Congress must provide a clear indication in the language of the statute or in the legislative history describing the purpose of the federal action. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* § 9.4 (3rd ed. 1986). For a complete discussion of the doctrine of preemption, see *id.* §§ 9.1 - 9.4 (1986).

³¹ *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) (federal anti-communist legislation supersedes Pennsylvania's Sedition Act). In *Nelson*, the Supreme Court enunciated a three-pronged inquiry to ascertain preemption parameters: (1) the pervasiveness of the federal regulatory scheme; (2) federal occupation of the field as necessitated by the need for national uniformity; and (3) the danger of conflict between state and federal law. *Id.* at 502-09.

³² *Hines*, 312 U.S. at 67.

³³ See J. NOVAK, R. ROTUNDA, AND J. YOUNG, *supra* note 30, at § 9.4. (determining congressional intent).

³⁴ 461 U.S. 190 (1983).

³⁵ *Id.* at 203-04.

³⁶ *Id.* (quoting *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153 (1982)).

state regulation.³⁷

The Supreme Court reaffirmed this doctrine in *Silkwood v. Kerr-McGee Corp.*,³⁸ holding that the constitutionality of an Oklahoma punitive damages statute was not preempted by federal law.³⁹ The Court reasoned that unless Congress evinces an intent to occupy the given field through pervasive regulation or an express provision, state law falling within the field is not preempted.⁴⁰ In *Silkwood*, the Court held that although the federal government retained exclusive authority to regulate safety standards within a particular industry, the states may continue to provide remedies for damages based on state statutes.⁴¹ In instances where there is no actual conflict between federal and state law, and where the congressional statute does not expressly preempt state law, the Supreme Court requires clear evidence of congressional intent to preempt all state regulation of the specific field covered by the statute.⁴²

B. *Preemption in the Area of Foreign Air Commerce*

The federal government through the Federal Aviation Act of 1958⁴³ has asserted regulatory power over foreign

³⁷ *Id.* at 221-23. In addressing the issue of federal preemption of state authority to impose conditions for the construction of nuclear power plants, the Court in *Pacific Gas* held that the California statute was not preempted by the Atomic Energy Act. The Court found clear evidence of congressional intent to preserve dual regulation of nuclear-powered generators in subcommittee debate on the Atomic Energy Act. *Id.*

³⁸ 464 U.S. 238 (1984).

³⁹ *Id.* at 258. The federal legislation in question in *Silkwood* was the Atomic Energy Act, which provided for private involvement in the development of atomic energy. *Id.* at 249. The Court in *Silkwood* found that "the only congressional discussion concerning the relationship between the Atomic Energy Act and state tort remedies indicates that Congress assumed that such remedies would be available." *Id.* at 251.

⁴⁰ *Id.* at 248.

⁴¹ *Id.* at 256.

⁴² *Id.* at 248. Through statutory construction based on a review of legislative history, the *Silkwood* Court concluded that Congress intended that persons injured in nuclear accidents were free to utilize state law remedies. *Id.* at 256.

⁴³ 49 U.S.C. §§ 1301-1552 (1982).

air commerce in the areas of licensing,⁴⁴ competition,⁴⁵ rates,⁴⁶ tariffs⁴⁷ and safety.⁴⁸ The highly structured and strictly controlled governmental plan for foreign air commerce has survived the complete deregulation of the domestic field of air transport.⁴⁹ Congress continues to shape foreign air commerce directly, through regulation pursuant to the Federal Aviation Act, and indirectly, through the extensive power delegated to the Department of State to negotiate air transport agreements with foreign nations.⁵⁰

Through the enactment of Section 1502(a) of the Federal Aviation Act of 1958, Congress requires the Department of Transportation to regulate foreign air commerce in accordance with any treaty, convention or agreement that may be in force.⁵¹ While Section 1502(a) mandates uniformity of policy, Section 1502(b) seeks a fully competitive foreign air transportation system with as few restrictions as possible.⁵² Prior to *Wardair*, the ability of state or

⁴⁴ See *id.* at § 1372 (licensing provision lists requirements for foreign air permits).

⁴⁵ See *id.* at § 1502(b) (goal of international aviation policy to achieve greatest degree of competition that is compatible with a well-functioning international air transportation system).

⁴⁶ See *id.* at § 1374(b) (prohibits unjust discrimination and unreasonable prejudice in foreign air transportation rates). See also *id.* at § 1482(f) (federal government retains power to adjust any discriminatory or prejudicial foreign rate).

⁴⁷ See *id.* at § 1373 (provisions regarding filing, posting and observance of tariffs and rebates).

⁴⁸ See *id.* at § 1421 (provisions granting authority over safety regulations in air commerce).

⁴⁹ Brief for Appellant *Wardair Canada, Inc.* at 37, *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 106 S. Ct. 2369 (1986) [hereinafter Brief for Appellant].

⁵⁰ *Id.* at 37-38.

⁵¹ 49 U.S.C. § 1502(a) (1982) (Congress intended that the Secretary of State and the Secretary of Transportation exercise their powers consistently with any obligation assumed by the United States in any treaty, convention or agreement currently in force).

⁵² 49 U.S.C. § 1502(b) (1982). In passing Section 1502(b), Congress intended to foster the "greatest degree of competition that is compatible with a well-functioning international air transportation system." In order to accomplish this goal, Congress endorsed a negotiating policy that advocated the elimination of operational and marketing restrictions as well as discriminatory and unfair competitive practices. The goals of Congress were to increase the number of gateway cities, integrate international and domestic air transportation, and provide opportunities

local governments to impose additional regulations over foreign air commerce was unclear.⁵³ The Federal Aviation Act does not expressly preempt state regulation of foreign air commerce.⁵⁴ In the area of taxation, Sections 1513(a) and (b) of the Federal Aviation Act specifically outline accepted and prohibited state and local taxes.⁵⁵ According to the standards of *Pacific Gas*⁵⁶ and *Silkwood*,⁵⁷ however, the federal government may still impliedly occupy the field of international air commerce if the requisite intent is demonstrated.⁵⁸

The legislative history of Section 1513 clearly demonstrates that Congress carefully considered tax alternatives

for foreign carriers to increase their access to points within the United States. Congressional policy specifically endorsed the "fewest possible restrictions on charter air transportation." *Id.* Wardair argued that state taxation of the instrumentalities of foreign commerce violated congressional intent as set forth in Section 1502(b).

⁵³ See *Scandinavian Airlines Systems, Inc. v. County of Los Angeles*, 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25, cert. denied, 368 U.S. 899 (1961) (ad valorem property tax levied by California upon aircraft owned, based and registered abroad and used exclusively in foreign commerce is unconstitutional under the Commerce Clause). But see *Sea-Land Service, Inc. v. County of Alameda*, 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974) (apportioned property taxation of containers owned by domestic corporation and used in intercoastal and foreign commerce upheld).

⁵⁴ The Federal Aviation Act does not specifically refer to either "state regulation" or "preemption" in outlining acceptable and prohibited taxes. See 49 U.S.C. § 1513 (1982). 49 U.S.C. § 1305 (1982) states that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier having authority under this . . . Act" This does not limit a state in the exercise of its proprietary powers and rights. *Id.* at § 1305(b)(1).

⁵⁵ Section 1513(a) expressly prohibits state taxation of persons traveling in air commerce (head charges) and taxation of the gross sales receipts of airlines. Section 1513(b) expressly permits a state to levy property taxes, franchise taxes, and sales or use taxes on the sale of goods or services.

⁵⁶ In *Pacific Gas*, the Supreme Court held that it could infer congressional intent to preempt all state regulation based on the degree of pervasiveness of the federal legislation. *Pacific Gas*, 461 U.S. at 204.

⁵⁷ In *Silkwood* the Supreme Court reiterated that in the absence of an express provision, the legislative history must evince clear congressional intent to occupy a given field. Although there is no actual conflict, the state law may not stand as an obstacle to the accomplishment of federal objectives. *Silkwood*, 464 U.S. at 248.

⁵⁸ For a discussion of preemption by congressional implication, see *supra* notes 34-42 and accompanying text.

prior to enactment.⁵⁹ The initial Senate proposal for Section 1513 would have prohibited all direct or indirect taxes on air transportation, but the individual states, through the National Association of State Aviation Officials, complained that this sweeping provision would prohibit unobjectionable taxes such as landing fees, fuel taxes, and sales taxes on food provided to airline passengers.⁶⁰ Both the CAB and the FAA also objected on grounds that local governments would be deprived of tax revenues for maintenance of municipal airports.⁶¹ To quiet these concerns, members of Congress assured officials that the prohibition would apply only to "head taxes" and that the purpose of the bill would be clarified.⁶² After thorough debate in both House and Senate hearings, the committees recommended compromise

⁵⁹ See *Airport Development Acceleration Act: Hearings on S. 2397 Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 92d Cong., 2d Sess. 129-198 (1972) [hereinafter *Senate Hearings*]; see also *Airport Development Acceleration Act: Hearings on H.R. 2337 Before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. (1972) [hereinafter *House Hearings*]. In *Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), the United States Supreme Court upheld a local "head tax." The nation's airlines could be required by state or local statute to collect and remit a per-person passenger charge for the use of airport facilities in order to reduce subsidies required of residents who do not use the airport. The negative response to this ruling prompted congressional hearings on local taxation of air transportation, and resulted in the enactment of the Airport Development Acceleration Act of 1973, Pub. L. No. 93-44 § 7(a), 87 Stat. 90 (1973) (now codified as amended at 49 U.S.C. § 1513 (1982)). Section 1513(a) preempts a limited number of state taxes, including "head taxes."

⁶⁰ S. 3611, 92d Cong., 2d Sess. (1972) (broad prohibition of all direct or indirect state taxes on air transportation); H.R. 2337, 92d Cong., 1st Sess. (1971) (similar prohibition). Local aviation officials opposed the broad nature of tax prohibitions proposed by the bills submitted to Congress. *House Hearings*, *supra* note 59, at 91 (statement of John A. Nammack, Executive Vice President, National Association of State Aviation Officials).

⁶¹ *Senate Hearings*, *supra* note 59, at 138 (statement of Whitney Gilliland, Vice Chairman, CAB); *id.* at 140-41 (statement of Ronald W. Pulling, Acting Associate Administrator for Plans, FAA). The opponents of this version of the bill argued that municipalities depended upon taxes to help defray the costs of airport construction and maintenance. *Id.*

⁶² See *House Hearings*, *supra* note 59, at 99. A "head tax" is a per-person tax on passengers traveling in air commerce. A passenger may be taxed each time an airplane lands at an airport regardless of whether the passenger disembarks. *Id.*

measures.⁶³

As enacted, Section 1513(a) prohibits "head charges" on airline passengers as well as taxes on gross sales receipts of airlines.⁶⁴ The Supreme Court clarified the scope of Section 1513(a) in *Aloha Airlines v. Director of Taxation of Hawaii*⁶⁵ by declaring that Hawaii's state tax on the gross income of the airlines operating within its borders, while styled as a property tax measured by gross receipts, was preempted by the specific language of Section 1513(a).⁶⁶ The Hawaii Supreme Court inferred that Section 1513(a) had been enacted out of congressional concern that a proliferation of local taxes would unduly burden the interstate air transportation system.⁶⁷ The

⁶³ See House Hearings, *supra* note 59, at 109. The Airport and Airways Development Act, Pub. L. 91-258, 84 Stat. 219 (1970), specifically required the airport sponsor to maintain a fee and rental structure for the facilities and services being provided for airport users which would make the airport as self-sustaining as possible. *Id.* at 115. The final bill attempted to eliminate the discriminatory practice of "per person" taxing while allowing airports a reasonable means of collecting revenue. *Id.* at 117.

⁶⁴ As enacted, Section 1513(a) provides that:

No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom

...

A tax on the annual gross income of airlines operating within a state as a means of taxing the airline's personal property was specifically preempted by this statute. For a discussion of preemption of taxes on annual gross income, see *infra* notes 65-68.

⁶⁵ 464 U.S. 7 (1983).

⁶⁶ *Id.* at 12. The state of Hawaii had subjected Aloha Airlines, a commercial airline carrying passengers, freight and mail, to a public service company tax of four percent of its yearly gross income. Hawaii stated that the tax was enacted as a means of taxing the tangible and intangible personal property of the airline, including its value as a going concern. Aloha Airlines sought a refund for taxes assessed between 1974 and 1977 on the grounds that 49 U.S.C. § 1513(a) had preempted the Hawaii statute. The Supreme Court held that although the tax was styled as a property tax, it was in fact a tax upon the gross sales receipts of the airline. As such it was preempted by the specific language of § 1513(a). *Aloha Airlines*, 464 U.S. at 10-11.

⁶⁷ *Aloha Airlines*, at 11-12. The Hawaii Supreme Court attempted to uphold the statute by looking beyond the direct language of Section 1513(a) to Congress' purpose in enacting the statute. The court concluded that if Section 1513(a) was passed to eliminate the proliferation of "head taxes," then a tax imposed upon air carriers rather than air travelers would be valid. The United States Supreme

Supreme Court rejected this reasoning and held that even an indirect tax on an airline's gross receipts was preempted by Section 1513(a)⁶⁸

While Section 1513(a) expressly prohibits specific taxes on air transportation and related services, Section 1513(b) reserves to the states to the right to impose certain other taxes as primary sources of revenue.⁶⁹ The statute allows a state to levy property taxes, franchise taxes, and sales or use taxes on the sale of goods or services;⁷⁰ however, this provision of the Federal Aviation Act has never been expressly extended to foreign carriers.⁷¹ The Federal Aviation Act defines "air commerce" to include "interstate, overseas and foreign air commerce."⁷² In congressional hearings, State Department and Legislative Council members advised that the term "air commerce" encompassed "foreign and overseas air commerce."⁷³ The legislative history is devoid of evidence of congressional intent to limit the tax provisions to state taxation of interstate commerce while prohibiting taxation of foreign air commerce.⁷⁴ However, the custom

Court rejected this reasoning and held that Section 1315(a) expressly prohibited states from directly or indirectly taxing gross receipts derived from air transportation. *Aloha Airlines*, 464 U.S. at 14.

⁶⁸ *Aloha Airlines*, 464 U.S. at 14.

⁶⁹ As enacted, Section 1513(b) provides that:

Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services. . . ."

⁷⁰ *Id.* Property taxes, however, may not exceed the tax rate applicable to commercial or industrial property in the same assessment jurisdiction. *Aloha Airlines*, 464 U.S. at 10-11.

⁷¹ *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 106 S. Ct. 2369, 2372 (1986). Because the Court found it plausible that Congress did not intend for the provisions of Section 1513 to be applicable to foreign air carriers, it did not rely on this section to resolve Commerce Clause issues raised by *Wardair*. *Id.*

⁷² 49 U.S.C. § 1301(4) (1982); 49 U.S.C. § 1310(10) (1982).

⁷³ See Senate Hearings, *supra* note 59, at 136, 207; House Hearings, *supra* note 59, at 35-37.

⁷⁴ See Senate Hearings, *supra* note 59, at 136; House Hearings, *supra* note 59, at 35-37. Since the State Department and the Senate Legislative Council advised Congress that "air commerce" encompassed foreign air commerce, Congress was aware that foreign as well as domestic carriers would be affected. *Wardair*, 106 S. Ct. at 2377.

of the industry has clearly differentiated between domestic and foreign carriers in allowing tax exemptions for the latter.⁷⁵

C. *The Dormant Foreign Commerce Clause: Limitations on State and Local Taxation*

It is a long-accepted constitutional doctrine that the Commerce Clause, without the aid of congressional regulation, affords some protection from state legislation that is adverse to national commerce.⁷⁶ A state is not free to impose demonstrative burdens on interstate or foreign commerce even though Congress has not preempted the field by affirmative regulation.⁷⁷ Dormant Commerce Clause power exists to protect interstate commerce from unconstitutional discrimination by the states.⁷⁸ When the Court, as final arbiter, seeks to decide the extent of permissible state regulation in light of a dormant Commerce Clause power, it is, in effect, attempting to interpret the meaning of congressional silence when the state intervenes in an area where the primary power is traditionally held by Congress.⁷⁹

When a state or local tax is measured against the dormant Commerce Clause, the Court seeks to allow the state or locality to extract from interstate commerce a fair share of the expenses of state and local government without unduly restricting the flow of interstate commerce.⁸⁰ In *Com-*

⁷⁵ Brief for Appellant, *supra* note 49, at 29-30. Foreign carriers have generally been exempted from taxes in a effort to encourage foreign trade and commerce, and out of fear of retaliatory taxes against American carriers abroad. *Id.*

⁷⁶ J. NOWAK, R. ROTUNDA AND J. YOUNG, *supra* note 30, § 8.1, at 261.

⁷⁷ See *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 773 (1945) (Arizona Train Limit Law imposes a serious burden on interstate commerce in that it materially impedes movement of interstate trains and interposes a substantial obstruction to the national policy of economical and efficient transportation service).

⁷⁸ *Id.* at 767.

⁷⁹ See *H.P. Hood & Sons, Inc. v. Dumond*, 336 U.S. 525, 530-39 (1949) (a state may not promote its own local economic advantage by curtailing the volume of interstate commerce; denial of license for additional milk processing plant unjustified).

⁸⁰ See *infra* notes 81-83 and accompanying text.

plete Auto Transit, Inc. v. Brady,⁸¹ the Court fashioned the modern four part test: a state or local tax on interstate commerce is permissible under the dormant Commerce Clause if: (1) it is "applied to an activity with a substantial nexus to the taxing state, (2) it is fairly apportioned, (3) [it] does not discriminate against interstate commerce, and (4) [it] is fairly related to the services provided by the State."⁸² In enunciating this test, the Supreme Court overturned a system which had previously allowed a blanket prohibition of any state tax imposed directly on an interstate transaction.⁸³

The Supreme Court subsequently outlined an additional constitutional analysis to be employed in instances where a state seeks to tax the instrumentalities of foreign commerce. In *Japan Line, Ltd. v. County of Los Angeles*,⁸⁴ California imposed an ad valorem property tax on the cargo shipping containers of six Japanese maritime companies.⁸⁵ The Court assumed, *arguendo*, that California's property tax would pass the nexus, apportionment and nondiscrimination tests of *Complete Auto*⁸⁶ and thus would

⁸¹ 430 U.S. 274 (1977).

⁸² *Id.* In *Complete Auto*, a Mississippi tax on the privilege of doing business within the state was held not to violate the Commerce Clause when it was applied to an interstate activity such as transportation by motor carrier to Mississippi car dealers of cars manufactured outside the state. *Id.*

⁸³ See *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951) (Supreme Court held that interstate commerce should enjoy a "free trade" immunity from state taxation); see also *Freeman v. Hewit*, 329 U.S. 249 (1946) (application of Indiana tax upon the receipt of the entire gross income of residents and domiciliaries held unconstitutional due to doctrine of tax immunity for interstate securities transactions. Indiana had sought to impose this tax on income generated from the sale of out-of-state securities). The decision by the Court in *Complete Auto* overturned the "Spector Rule." *Complete Auto*, 430 U.S. at 283-89.

⁸⁴ 441 U.S. 434 (1979).

⁸⁵ *Id.* at 436-37.

⁸⁶ The County of Los Angeles argued that the containers had a substantial nexus with the state because some containers were present within the state at all times. *Id.* at 445. The county argued further that the tax was fairly apportioned because it was levied only on the containers' average presence within the state, and it fell evenhandedly on all personal property within the state. *Id.* Since California provided essential fire and police protection, as well as the benefits of a trained work force, the tax was fairly related to the services provided by the state. *Id.* For a discussion of the *Complete Auto* standard, see *supra* notes 80-83 and accompanying text.

be valid under the dormant Commerce Clause if the containers were instrumentalities of purely interstate commerce.⁸⁷ Because the containers were instrumentalities of foreign commerce, however, the Court held that it was necessary to answer two additional questions in assessing the tax's validity: "[f]irst, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second, whether the tax prevents the Federal Government from speaking with one voice when regulating commercial relations with foreign governments."⁸⁸ If a state tax contravenes either of these precepts, the Court held, it is unconstitutional under the Commerce Clause.⁸⁹ The Court concluded that California's tax failed both of these tests.⁹⁰ Since the containers were taxed on their full value in Japan, California's levy necessarily caused international multiple taxation.⁹¹ In addition, the imposition of charges on cargo containers used exclusively in international traffic frustrated the attainment of federal uniformity.⁹²

In determining that the taxation of cargo containers was a subject necessitating a uniform national rule, the Court relied on two principal considerations. First, since Japan did not tax American-owned containers, the Court noted that California's tax created an asymmetry in the international tax structure operating to Japan's disadvan-

⁸⁷ *Japan Line*, 441 U.S. at 446.

⁸⁸ *Id.* at 451. The Court rejected the argument that the Commerce Clause analysis is identical for both interstate and foreign commerce. *Id.* at 446. The Court cannot ensure full apportionment when one of the taxing entities is a foreign sovereign; therefore, the risk of multiple taxation is enhanced. *Id.* at 447. Additionally, a state tax that affects foreign commerce may impair federal uniformity in an area where federal uniformity is essential. *Id.* at 448.

⁸⁹ *Id.* at 451.

⁹⁰ *Id.* at 451, 453-54.

⁹¹ *Id.* at 451-52. The Court also rejected California's argument that it should not be foreclosed from taxation because Japan had elected to tax the containers in full. Japan had the right to tax the containers at their full value. While the Court can demand apportionment of taxes in the interstate commerce context, it is powerless to correct malappropriations in foreign commerce. *Id.* at 447.

⁹² *Id.* at 452-53. The Court emphasized that foreign commerce is a matter of national concern and that the taxation of foreign commerce necessitates a uniform national rule. *Id.* at 448-49.

tage.⁹³ The Court stated that a state tax on foreign commerce must be evaluated in the realistic framework of the customs of nations.⁹⁴ In international practice, aircraft and ships engaged in foreign traffic were immune from taxation except in their country of origin or nation of registry.⁹⁵ Because cargo shipping containers were considered to be instrumentalities of international traffic, Japan taxed these containers with the legitimate expectation that they would not be taxed elsewhere.⁹⁶ Furthermore, if the state tax created an asymmetry, foreign nations disadvantaged by the levy could retaliate against American-owned instrumentalities present in their jurisdiction.⁹⁷ While the Court noted that some nations provided a tax exemption only if a reciprocal tax exemption was granted,⁹⁸ the Court felt that a retaliatory tax would be directed at all American transportation equipment and not just the taxing state, so that the nation as a whole would suffer.⁹⁹

The Customs Convention on Containers, a multinational agreement between the United States and Japan, composed the Court's second factor evincing the necessity of uniformity.¹⁰⁰ The agreement provided that containers temporarily imported into the United States were to be admitted duty free.¹⁰¹ Although Congress had not

⁹³ *Id.* at 453. If a state imposes an apportioned tax, international disputes over the apportionment formula may arise. *Id.* at 450. Because the containers in question were in fact taxed in Japan, California's levy constituted double taxation. *Id.* at 452.

⁹⁴ *Id.* at 454.

⁹⁵ *Id.* at 447 n.11. This practice was known throughout the international community as the "home port doctrine." *Id.* at 442-43.

⁹⁶ *Id.* at 454. A multinational agreement entered into between Japan and the United States designated the Japanese containers as instruments of international traffic. See Customs Convention on Containers, May 18, 1956, United States-Japan, art. I(b), 20 U.S.T. 301, 304, T.I.A.S. No. 6634.

⁹⁷ *Japan Line*, 441 U.S. at 450.

⁹⁸ *Id.* at 453 n.18. When apprised of California's tax, the European Economic Community began consideration of "suitable counter-measures." *Id.*

⁹⁹ *Id.* at 453.

¹⁰⁰ Customs Convention on Containers, May 18, 1956, United States-Japan, 20 U.S.T. 301, T.I.A.S. No. 6634.

¹⁰¹ *Id.* at 304. The agreement grants containers "temporary admission free of

expressly preempted the field by affirmative regulation, the Court did not find this fact dispositive, since the Commerce Clause affords protection from state legislation inimical to national commerce.¹⁰² The Court reasoned that the multinational agreement reflected a national policy to remove impediments to the use of containers as instruments of international traffic, and that allowing the California tax would frustrate the free flow of national commerce.¹⁰³ In invalidating California's tax on foreign-owned containers, the Supreme Court held that a state, by its unilateral act, could not place impediments before the nation's conduct of its foreign relations and its foreign trade.¹⁰⁴

D. *National Policy Limitations on State Taxation*

Aviation relations with foreign governments are implemented through a system of treaties and bilateral executive agreements.¹⁰⁵ These agreements produce a pattern of reciprocal tax exemptions not only for aircraft, but also for equipment and supplies which constitute the instrumentalities of foreign commerce.¹⁰⁶ For instance, the Chicago Convention,¹⁰⁷ a treaty binding the United States and 156 other signatory nations, reflects an accepted international policy of reciprocal tax exemptions.¹⁰⁸ Article

import duties and taxes and free of import prohibitions and restrictions" if the containers are used solely in foreign commerce and are subject to re-exportation.
Id.

¹⁰² *Japan Line*, 441 U.S. at 454.

¹⁰³ *Id.* at 453.

¹⁰⁴ *Id.*

¹⁰⁵ 49 U.S.C. § 1502(a) (1982) requires compliance by the Secretary of Transportation with all treaties, conventions and agreements which may be in force between the United States and foreign countries.

¹⁰⁶ The pattern of reciprocal tax exemptions is illustrated by provisions of the various international agreements. *See, e.g.*, Customs Convention on Containers, *supra* notes 100-101; Chicago Convention, *supra* note 15, art. 24(a); United States/Canada Nonscheduled Air Service Agreement, art. XII, *infra* notes 117-118.

¹⁰⁷ *See supra* note 12.

¹⁰⁸ Chicago Convention, *supra* note 12, art. 24(a) endorses specific tax exemptions for fuel retained on board foreign aircraft; however, the Convention did not attempt to deal comprehensively with tax questions. *Id.* at 1186. *See Dempsey, The*

24(a) of the Chicago Convention provides that fuel, lubricating oil, spare parts, regular equipment and aircraft stores retained on board an aircraft shall be free from national or local duties.¹⁰⁹ This provision, however, refers only to fuel retained on board an aircraft and does not apply to fuel purchased from suppliers in the foreign country.¹¹⁰ Therefore, a local tax on fuel purchased in a foreign country could conceivably not violate the Chicago Convention.

The United States is a member of the International Civil Aviation Organization (ICAO) by virtue of participation in the Chicago Convention.¹¹¹ The Air Transport Committee of the ICAO undertook a comprehensive study of problems related to international air transport taxation and subsequently adopted resolutions designed to reduce, to the extent possible, all forms of taxation on the sale or use of the instrumentalities of air commerce.¹¹² In 1966, the ICAO Committee adopted a resolution which stated that fuel, lubricants and other consumable technical supplies taken on board an aircraft for consumption during an international flight would be exempt from all

Role of the International Civil Aviation Organization on Deregulation, Discrimination and Dispute Resolution, 52 J. AIR L. & COM. 529, 554 (1987).

¹⁰⁹ For a complete text of article 24(a), see *supra* note 15.

¹¹⁰ Chicago Convention, *supra* note 12, art. 24(a) limits the exemption to fuel "on board an aircraft. . . on arrival in the territory . . . and retained on board on leaving the territory . . ."

¹¹¹ See Chicago Convention, *supra* note 12, arts. 43-66. The ICAO, an organization established by the convention to lessen discrimination between the signatories, promotes development of all aspects of international civil aeronautics. The ICAO has advocated the removal of all taxes on foreign airlines on a reciprocal basis. Under the ICAO policies, only the nation in which the carrier is headquartered would be allowed to impose significant taxes. See Dempsey, *supra* note 108, at 554.

¹¹² See Dempsey, *supra* note 108, at 555. The Air Transport Committee, an ICAO subgroup, undertook a comprehensive study of existing and anticipated problems related to international air transport taxation, since the Chicago Convention itself did not attempt to deal comprehensively with tax matters. The resolutions drafted by the Air Transport Committee and adopted by the ICAO in 1951 addressed the taxation of fuel, income, and aircraft, as well as sales or use taxes on international air transportation. *Id.* The purposes of the resolutions were to prevent multiple taxation and to restrict tax liability of carriers to the nation where the carrier was headquartered. *Id.*

customs and other duties, or alternatively, any duties would be refunded.¹¹³ The ICAO Council explained that this resolution endorsed the longstanding maritime practice of reciprocal tax exemptions.¹¹⁴ While the resolution itself has never been formally adopted in the United States, most of the signatories to the Chicago Convention have substantially implemented its terms.¹¹⁵

Because a Canadian carrier challenged the constitutionality of Florida's fuel tax, it is important to note that the United States has entered into an executive bilateral agreement with Canada governing the system of non-scheduled, or charter, air transportation between the two countries.¹¹⁶ Article XII of the United States/Canada Nonscheduled Air Services Agreement provides that each contracting party must exempt carriers of the other contracting party to the fullest extent possible from excise taxes, inspection fees, duties or other charges on fuel taken on board an aircraft within the other country's territory intended solely for use in international services.¹¹⁷

¹¹³ The 1951 Resolutions were essentially reaffirmed by the ICAO in 1966. See ICAO's *Policies on Taxation in the Field of International Air Transport*, ICAO Doc. 8632-C/968 (Nov. 1966) [hereinafter ICAO Policies]. The Council Resolution on Taxation of Fuel, Lubricants, and Other Consumable Technical Supplies (Reaffirmed by Council Resolution Nov. 14, 1966) Sec. 1 states:

(1) When an aircraft registered in one State arrives in the territory of another State, the fuel, lubricants, and other consumable technical supplies contained in the . . . aircraft shall be exempt from customs or other duties;

(2) When an aircraft . . . departs . . . the fuel, lubricants and other consumable technical supplies taken on board for consumption during the flight should be furnished exempt from all customs or other duties

The resolution defined "customs" and "other duties" to include "import, export, excise, sales, consumption and international duties and taxes of all kinds levied upon the fuel, lubricants and other consumable technical supplies by taxing authority within a state." *Id.* para. 4.

¹¹⁴ See *Amicus Curiae Brief*, *supra* note 4, at 11.

¹¹⁵ See Dempsey, *supra* note 108, at 556 n.103.

¹¹⁶ See *supra* note 11.

¹¹⁷ Article XII(1)(c) of the Air Service Agreement, *supra* note 11, negotiated and executed on behalf of the United States by the Department of State pursuant to 49 U.S.C. § 1462 (1986), provides that the airlines of the United States and Canada are:

exempt. . . to the fullest extent possible under national law from

Each contracting party must grant the exemption whether or not the fuel was consumed wholly within the other country's territory.¹¹⁸

Canada has interpreted the Nonscheduled Air Service Agreement as endorsing provincial taxation of fuel and has rejected the international practice of reciprocal tax exemptions.¹¹⁹ Canadian provincial governments impose taxes on aviation fuel purchased within their borders and do not grant exemptions for fuel purchased by foreign airlines for use in foreign commerce.¹²⁰ The tax rates varied from province to province in April 1983, when Florida enacted its levy, ranging from a low of 1.9 cents per gallon in Newfoundland to a high of 13.55 cents per gallon in British Columbia.¹²¹ The rates represented approximately 2-15% of the total purchase price paid by a United States carrier.¹²² Two provinces, Quebec and Alberta, exempted foreign airlines from tax.¹²³

In the thirty-eight years since the Chicago Convention, the United States has signed bilateral aviation agreements with more than seventy countries.¹²⁴ Almost all of the bi-

import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel . . . taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services . . . whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption.

¹¹⁸ *Id.*

¹¹⁹ *Amicus Curiae Brief, supra* note 4, at 4-5.

¹²⁰ *Id.* Although Canadian provinces have levied sales tax on aviation fuel for many years, no formal complaints have been lodged by United States air carriers. The reason for the absence of complaint is that the principal Canadian destinations of Montreal, Calgary and Edmonton lie in the two provinces, Quebec and Alberta, that exempt foreign carriers from fuel tax. Toronto, the chief destination in the province of Ontario, imposes a fuel tax, but the refinery price for jet fuel in Ontario was lower than that prevailing elsewhere in Canada. *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See, e.g.,* Aviation Transport Services Agreement, Oct. 24, 1956, United States-Colombia, art. 7(d), 14 U.S.T. 429, T.I.A.S. No. 5338; Air Transport Services Agreement, Aug. 15, 1960, United States-Mexico, art. 7(d), 12 U.S.T. 60, T.I.A.S. No. 4675; Air Transport Agreement, Apr. 13, 1953, United States-Venezuela, art. 4(c), 4 U.S.T. 1495, T.I.A.S. No. 2813; Air Transport Services Agree-

lateral agreements obligate the United States to exempt the designated airlines from customs, duties, excise taxes and inspection fees to the fullest extent possible.¹²⁵ In according reciprocal exemptions for aviation fuel taken on board foreign aircraft within this country, the bilateral agreements typically refer to national duties or federal taxes.¹²⁶ None of the bilateral aviation agreements explicitly prohibit state or local taxes on aviation fuel used by foreign airlines in international traffic.¹²⁷ To that extent, the bilateral agreements do not reflect the full scope of federal aviation policy as evidenced by the ICAO Resolutions.¹²⁸

II. *WARDAIR CANADA, INC. V. FLORIDA DEP'T OF REVENUE*

In *Wardair*, the Supreme Court confronted the issue of whether the Federal Aviation Act, by express language or pervasive policy, preempted Florida's tax on aviation fuel purchased by international air carriers.¹²⁹ The Court relied primarily on its power of statutory interpretation in rejecting Wardair's argument that Congress, through the Federal Aviation Act, had decreed that the federal govern-

ment, Sept. 22, 1947, United States-Argentina, § F(2,3), 29 U.S.T. 2795, T.I.A.S. No. 8978.

¹²⁵ The agreement between the United States and Mexico obligates each country to:

exempt the designated . . . airlines of the other Contracting Party to the fullest extent possible under . . . national law, on the basis of reciprocity, from import restrictions, customs duties, excise taxes, inspection fees, and other *national duties and charges* on fuel, lubricants, . . . and other equipment and supplies used in international air service.

Air Transport Service Agreement, Aug. 15, 1960, United States-Mexico, art. 7(d), 12 U.S.T. 60, T.I.A.S. No. 4675 (emphasis added).

¹²⁶ See *id.* Other agreements refer to charges "imposed by national authorities," or "federal taxes." Amicus Curiae Brief, *supra* note 4, at 15.

¹²⁷ Amicus Curiae Brief, *supra* note 4, at 17.

¹²⁸ The ICAO Resolution, *supra* note 113, prohibits the imposition of import, export, excise, sales, consumption and other international duties by *any taxing authority* within a state. The ICAO Resolutions, however, have never been formally adopted by the United States. *Wardair Canada*, 106 S. Ct. at 2374.

¹²⁹ *Wardair Canada*, 106 S. Ct. at 2370. For a discussion of the standards required for federal preemption of state legislation, see *supra* notes 27-42 and accompanying text.

ment has exclusive regulatory power over foreign air commerce.¹³⁰ While acknowledging that Congress regulated aviation extensively through the Federal Aviation Act, the Court construed its provisions as expressly permitting state taxes.¹³¹ The Court interpreted Section 1513(a) of the Federal Aviation Act as expressly prohibiting specific state taxes,¹³² while Section 1513(b) expressly permitted state "sales or use taxes on the sale of goods or services."¹³³ To the Court, the fuel tax was plainly a "sales tax on the sale of goods" within the language of Section 1513(b) and was therefore a permissible tax.¹³⁴ Because the statute did not expressly declare state law to be preempted, the Court found no conflict between state and federal law.¹³⁵ Neither did it find a system of regulation so pervasive as to "occupy the field" of international aviation according to the standard of *Pacific Gas*.¹³⁶

As set forth in *Silkwood*, evidence of congressional intent to preempt must be present in order to set aside a state law as unconstitutional.¹³⁷ Because of the express language of Section 1513(b), the Court interpreted con-

¹³⁰ Wardair asserted that Florida's tax violated a "clear unequivocal directive of Congress" that is implicit in the Federal Aviation Act of 1958. The Court construed the Federal Aviation Act and concluded that the federal government had not asserted exclusive regulatory power over foreign air commerce through that legislation. *Wardair Canada*, 106 S. Ct. at 2370.

¹³¹ *Id.* at 2372.

¹³² The states were prohibited from assessing head charges on passengers traveling in air commerce and taxing the gross receipts of air carriers derived from the sale of air transportation. For a discussion of the terms and implications of Section 1513(a), see *supra* notes 64-68 and accompanying text.

¹³³ The states were permitted to impose property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services. For a discussion of the terms and implications of Section 1513(b), see *supra* notes 69-71 and accompanying text.

¹³⁴ *Wardair Canada*, 106 S. Ct. at 2372.

¹³⁵ *Id.*

¹³⁶ According to *Pacific Gas*, congressional intent to preempt state law may be "found from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it." *Pacific Gas*, 461 U.S. at 203-04. See *supra* notes 36-37 and accompanying text for a discussion of *Pacific Gas*. Because the Federal Aviation Act expressly reserved to the states certain avenues of taxation, the Court did not find the degree of pervasiveness needed for preemption. *Wardair Canada*, 106 S. Ct. at 2372.

¹³⁷ *Silkwood*, 464 U.S. at 248.

gressional intent as explicitly permitting state taxation on the sale of goods.¹³⁸ Wardair argued, however, that Congress drafted the provisions of Section 1513 to apply exclusively to domestic carriers and did not consider whether states would be permitted to tax foreign carriers.¹³⁹ Because the Court found this argument plausible, it did not rely on the preemption analysis to answer questions raised by the dormant foreign Commerce Clause.¹⁴⁰

In its dormant foreign Commerce Clause analysis, the Court's concern centered on the policy of uniformity rather than on an actual conflict between federal and state law.¹⁴¹ Wardair did not dispute that the tax met the test of *Complete Auto*.¹⁴² Wardair also recognized that the tax created no threat of multiple international taxation according to the standard of *Japan Line*, since the tax was imposed upon the sale of fuel in only one jurisdiction.¹⁴³ Wardair relied exclusively upon the final factor identified in *Japan Line*: the effect of the local rule on the ability of the federal government to speak with one voice in regulating areas of national rather than local concern.¹⁴⁴ In ar-

¹³⁸ *Wardair Canada*, 106 S. Ct. at 2372. Section 1513(b) expressly stated that "nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in [1513](a) . . . including . . . sales or use taxes on the sale of goods or services . . ." (emphasis added). For a discussion of Section 1513(b), see *supra* notes 69-71 and accompanying text.

¹³⁹ *Wardair Canada*, 106 S. Ct. at 2372. Although Section 1301(4) of the Federal Aviation Act defines "air commerce" to include "interstate, overseas or foreign air commerce," the Court only expressly extended to the states the power to tax domestic, rather than foreign carriers. For this reason, the Court did not base its opinion solely on grounds of preemption. *Id.*

¹⁴⁰ *Id.* Wardair Canada also challenged Florida's tax on the ground that it impermissibly interfered with the federal government's ability to uniformly regulate foreign commerce. Because this issue was raised, the Court was forced to analyze the tax on dormant foreign Commerce Clause grounds. *Id.*

¹⁴¹ *Id.* at 2379. Florida's tax did not actually conflict with the provisions of Section 1513(b) of the Federal Aviation Act. For a discussion of the terms of Section 1513(b), see *supra* notes 69-71 and accompanying text.

¹⁴² *Wardair Canada*, 106 S. Ct. at 1273. For a discussion of dormant Commerce Clause analysis according to the standard of *Complete Auto*, see *supra* notes 80-83 and accompanying text.

¹⁴³ *Wardair Canada*, 106 S. Ct. at 2373. See *supra* notes 84-99 and accompanying text for a discussion of the additional test, outlined in *Japan Line*, to be applied when a state taxes the instrumentalities of foreign commerce.

¹⁴⁴ *Wardair Canada*, 106 S. Ct. at 2373. For a discussion of the role of uniformity

guing that the Florida tax compromised the federal government's ability to uniformly regulate commerce, Wardair emphasized that international air commerce is an area of national concern.¹⁴⁵ Wardair analogized aviation fuel to the cargo containers in *Japan Line* and argued that federal policy granted tax exemptions to instrumentalities of foreign commerce.¹⁴⁶ A state tax would frustrate the attainment of federal uniformity.

Wardair Canada contended that Section 1502(a) and (b) of the Federal Aviation Act,¹⁴⁷ Article 24(a) of the Chicago Convention,¹⁴⁸ the Resolution adopted November 14, 1966, by the ICAO,¹⁴⁹ and more than seventy bilateral agreements¹⁵⁰, including the United States/Canada Non-scheduled Airline Services Agreement, entered into by the United States with various foreign countries all manifest a policy of uniform reciprocal tax exemptions.¹⁵¹ In reviewing the documents, however, the Court did not find governmental silence that triggers dormant Commerce Clause analysis.¹⁵² In fact, the Court found that the federal government had acted affirmatively in delineating permissible and prohibited state taxes in Section 1513(a)

in dormant Commerce Clause analysis, see *supra* notes 88-104 and accompanying text.

¹⁴⁵ *Wardair Canada*, 106 S. Ct. at 2373.

¹⁴⁶ *Id.* Wardair argued that a policy of reciprocal tax exemptions existed for the aircraft, equipment and supplies that constitute the instrumentalities of international air traffic, and that this federal policy of uniformity was threatened by Florida's tax. *Id.* at 2372-74.

¹⁴⁷ For a discussion of the terms of Section 1502 of the Federal Aviation Act of 1958, see *supra* notes 51-53 and accompanying text.

¹⁴⁸ For a complete text of art. 24(a) of the Chicago Convention, see *supra* note 15.

¹⁴⁹ See *supra* note 113 for a discussion of the terms of the Resolution adopted by the ICAO.

¹⁵⁰ For a discussion of the terms of the bilateral agreements governing international aviation, including the Canadian Nonscheduled Airline Services Agreement, see *supra* notes 117-128 and accompanying text.

¹⁵¹ *Wardair Canada*, 106 S. Ct. at 2374.

¹⁵² *Id.* at 2374. On the contrary, the Court found that the cited legislation and international agreements demonstrated that the federal government had acted affirmatively in legislating acceptable state taxes. *Id.*

and (b) of the Federal Aviation Act.¹⁵³

In considering the evidence, the court determined that the current law allows taxation of the sale of fuel by political subdivisions of countries.¹⁵⁴ The Court relied on the express language of Article 24(a) of the Chicago Convention.¹⁵⁵ Article 24(a) prohibits taxes on fuel when the fuel is on board the aircraft upon arrival and retained on board when leaving a foreign country, but does not prohibit taxation of fuel purchased within that country.¹⁵⁶ The Court concluded that the parties of the Chicago Convention were aware of the negative implications of state and local taxation, and addressed the problem by curtailing some aspects of the localities' power to tax while implicitly preserving other aspects of that authority.¹⁵⁷

The Court discarded the ICAO Resolution's endorsement of tax exemptions on fuel because the Resolution had not been specifically endorsed, approved, or passed by either the executive or legislative branch of the federal government.¹⁵⁸ The Court characterized the ICAO Resolution as a policy of an organization of which the United States is one of many members, rather than as a policy of the United States.¹⁵⁹ After reviewing more than seventy bilateral agreements between the United States and foreign countries, the Court found that none of the documents deny the individual states the power to tax.¹⁶⁰

¹⁵³ For a complete text of Section 1513, see *supra* notes 64-70 and accompanying text.

¹⁵⁴ *Wardair Canada*, 106 S. Ct. at 2374. In reviewing the Conventions and international agreements, the Court found that while there appeared to be an international aspiration to eliminate all impediments to foreign air travel, the law acquiesced in taxation of the sale of fuel. *Id.*

¹⁵⁵ See *id.* For a complete text of art. 24(a) of the Chicago Convention, see *supra* note 15.

¹⁵⁶ See *supra* note 15.

¹⁵⁷ *Wardair Canada*, 106 S. Ct. at 2374.

¹⁵⁸ *Id.* at 2374-75.

¹⁵⁹ For a discussion of the ICAO Resolution in question, see *supra* notes 111-115 and accompanying text.

¹⁶⁰ *Wardair Canada*, 106 S. Ct. at 2375. For an example of the bilateral agreements that were submitted for review by the Court, see *supra* notes 124-128 and accompanying text.

Rather, most of the agreements prohibit the imposition of national taxes.¹⁶¹ Similarly, the United States/Canada Nonscheduled Air Services Agreement limits the tax exemptions afforded to the other nation's carriers to national duties and charges, but does not mention whether taxation by political subdivisions is exempt.¹⁶² The Court interpreted this omission as a policy choice to allow state taxation.¹⁶³

The Court also noted the Canadian policy of provincial taxation of fuel.¹⁶⁴ Although it did not consider this course of conduct dispositive, the Court interpreted it as evidence of an understanding among all parties to permit taxation by political subdivisions.¹⁶⁵ According to the Court, the evidence clearly demonstrated an affirmative governmental choice not to preclude local taxation.¹⁶⁶ Since dormant Commerce Clause analysis was not triggered, the Court accordingly did not address whether the Commerce Clause would invalidate Florida's tax in the absence of the international agreements.¹⁶⁷

In his concurrence, Chief Justice Burger concluded that Congress fully considered the scope of state taxation in the area of air commerce before passing Section 1513(b) in its current form.¹⁶⁸ Justice Burger also concluded that

¹⁶¹ *Wardair Canada*, 106 S. Ct. at 2375. For text of the United States-Mexico Air Service Agreement regarding exemption from taxation, see *supra* note 125.

¹⁶² See *supra* note 117 for the complete text of the United States-Canada Nonscheduled Air Service Agreement, art. XII(1)(c).

¹⁶³ *Wardair Canada*, 106 S. Ct. at 2375.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* The Court pointed out that the ICAO Resolution had addressed the problem of state and local taxation eight years before the United States and Canada signed the Nonscheduled Air Services Agreement. *Id.* Because the parties did not prohibit state and local taxes, and because Canadian provinces routinely impose such taxes, the Court interpreted the Agreement as permitting this type of taxation. *Id.*

¹⁶⁶ *Id.* at 2373. The dormant Commerce Clause ensures that the channels of foreign commerce are not impermissibly burdened in the absence of congressional action. Because the Court interpreted the air service agreements and the Federal Aviation Act as affirmative acts by Congress to allow state taxation, dormant Commerce Clause analysis is inapplicable. *Id.* at 2375.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 2376. Justice Burger relied heavily on the legislative history of Section

Congress realized that the provisions of the bill would encompass foreign and overseas commerce.¹⁶⁹ In reaching this conclusion, he relied upon the Federal Aviation Act's general definition of air commerce as including "inter-state, overseas or foreign air commerce."¹⁷⁰ Justice Burger would have decided the case on the basis of preemption and disregarded dormant Commerce Clause issues.¹⁷¹

In his dissent, Justice Blackmun expressed the view that Florida's tax violated the dormant Commerce Clause because the taxation of international aviation fuel necessitated a uniform national rule.¹⁷² Justice Blackmun found this case indistinguishable from *Japan Line*.¹⁷³ He stressed that "[f]or a state regulation to be removed from the reach of the dormant Commerce Clause, the intent of the federal government to permit state activity must be unmistakably clear."¹⁷⁴ According to Justice Blackmun, the case lacked the required evidence of affirmative congressional approval of state taxation.¹⁷⁵

In Justice Blackmun's opinion, the federal government's efforts in diplomacy reveal an "overarching and

1513 in reaching his conclusion that Congress did not intend to preempt state legislation. *Id.* at 2376-77. For a discussion of the legislative history of section 1513, see *supra* notes 59-64 and accompanying text.

¹⁶⁹ *Wardair Canada*, 106 S. Ct. at 2377.

¹⁷⁰ *Id.* at 2377-78. See *supra* notes 72-75 and accompanying text for a discussion of Federal Aviation Act definitions upon which Justice Burger based his opinion.

¹⁷¹ *Wardair Canada*, 106 S. Ct. at 2378. In Justice Burger's opinion, the plain language of Section 1513 of the Federal Aviation Act authorized Florida's fuel tax. By engaging in dormant Commerce Clause analysis, the Court was failing "to honor the choice already made by Congress following extensive consideration of the problem" *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* See *supra* notes 84-104 and accompanying text for a discussion of *Japan Line*. Justice Blackmun asserted that Florida's tax on fuel, like California's tax on shipping containers used exclusively in foreign commerce, would prohibit the federal government from "speaking with one voice" when regulating foreign commerce. *Wardair Canada*, 106 S. Ct. at 2378.

¹⁷⁴ *Wardair Canada*, 106 S. Ct. at 2378. Justice Blackmun contended that "not prohibiting" a state tax is different from "affirming" a state tax. *Id.* at 2378-79. In the absence of congressional affirmation, the burden placed on foreign commerce was too great. *Id.*

¹⁷⁵ *Id.* at 2378-79.

coherent policy" of granting reciprocal tax exemptions.¹⁷⁶ In his view, the fact that treaty provisions stop short of banning state taxes did not demonstrate the absence of federal policy, but simply meant that the United States had not yet succeeded in transforming the policy into law.¹⁷⁷ Justice Blackmun interpreted the documents to reveal a federal policy to eliminate impediments to foreign air travel.¹⁷⁸ According to Justice Blackmun, the majority ruling hinders the United States in efforts to obtain reciprocal tax immunity and undermines current reciprocity agreements.¹⁷⁹

III. PRACTICAL IMPLICATIONS AND CONCLUSIONS

The *Wardair* decision represents a setback for State Department officials who made aggressive efforts over the years to implement the policy of reciprocal tax exemptions both internationally and domestically. In a series of letters addressed to the Florida Department of Revenue beginning in 1982, the State Department noted that it was surprised and distressed to learn of Florida's proposal for an extension of state taxes.¹⁸⁰ It emphasized that state taxes would undermine and frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation for consumers.¹⁸¹

The Solicitor General of the United States, as Amicus Curiae, voiced the specific concerns of the State Department.¹⁸² According to the Solicitor General, if the foreign

¹⁷⁶ *Id.* at 2379.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 2378. Justice Blackmun rejected the view that once the federal government has spoken at all in an area, the Commerce Clause operates to permit states to act unless such action is expressly prohibited. *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Amicus Curiae Brief, *supra* note 4, at 21-22.

¹⁸¹ *Id.* In 1982, the State Department wrote the tax departments of various states, including Florida, after receiving protests from Great Britain. After the fuel tax extension in 1983, the State Department contacted Florida again and warned of serious foreign relations problems that could develop. *Id.*

¹⁸² See Brief for the United States as Amicus Curiae in Support of Appellant, No.

domicile granted reciprocity, Florida's action would invite retaliatory taxation against United States' carriers.¹⁸³ Such retaliation would be felt by the nation as a whole.¹⁸⁴ In the past, United States airlines have encountered a variety of discriminatory measures abroad.¹⁸⁵

Alternatively, if a foreign domicile does not grant reciprocal exemptions, the imposition of state or local taxes could undercut negotiations by the United States designed to rectify the problem of discrimination.¹⁸⁶ Due to state assessment of local taxes, the United States could not offer equal reciprocity in return.¹⁸⁷ This denial of equal reciprocity will inevitably frustrate the federal objective of achieving and maintaining reciprocal tax advantages.¹⁸⁸

Prior to trial, the federal government received diplomatic notes from twenty-five foreign countries protesting Florida's tax on aviation fuel.¹⁸⁹ The diplomatic notes uniformly pointed to the "international consensus" and "established international practice" of granting reciprocal tax exemptions as evidenced by the 1966 ICAO Resolution and the bilateral aviation compacts.¹⁹⁰ The notes urged the federal government to take the diplomatic steps

84-902, *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 106 S. Ct. 2369 (1986) [hereinafter *Amicus Curiae* Brief II].

¹⁸³ *Id.* at 7.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 10. Discriminatory measures imposed on United States carriers in the past include the levy of artificially inflated user fees, the imposition of obstacles to repatriation of foreign earnings, the routing of airlines to less desirable airports, the refusal to allow carriers to use baggage handlers of choice, the award to local airlines of preference in carrying air cargo, the imposition of restrictions on United States airlines' local advertising, and the infliction of excessively complicated customs procedures and bureaucratic red tape. *Id.*

¹⁸⁶ *Id.* at 7.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ See *Amicus Curiae* Brief, *supra* note 4, app. 1a-58a. These countries included Argentina, Belgium, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, France, West Germany, Honduras, Iceland, Israel, Italy, Japan, Mexico, Netherlands, Norway, Panama, Spain, Switzerland, Trinidad and Tobago, United Kingdom, and Yugoslavia. *Id.*

¹⁹⁰ In the notes each nation expressed the concern that the tax would threaten her air carriers' ability to function economically under current tax and trade

necessary to effect a resolution of the problem.¹⁹¹

Despite the defeat of State Department objectives, the majority opinion emphasized the Court's concerns that all airlines deserve equal treatment and that state statutes should not discriminate against domestic airlines in favor of foreign airlines competing on the same route system. Since the Court had denied review of a similar suit filed by domestic carriers challenging the constitutionality of Florida's tax,¹⁹² the State of Florida asserted that to limit the tax would destroy competitive equality between domestic and foreign carriers by requiring Florida to grant the latter a tax subsidy that their domestic competitors did not enjoy.¹⁹³ A continued tax exemption would indeed grant foreign airlines a "tax holiday" in the purchase of aviation fuel, equipment and supplies on which their domestic competitors would have to pay tax. United States air carriers would in turn have a tax holiday abroad because of the symmetrical nature of the reciprocal exemption policy. The Court, however, preferred to characterize the tax based on its impact on international commerce according to the *Complete Auto* standard.¹⁹⁴ According to this standard, Florida's tax did not cause asymmetry in the international tax structure since the tax provided equal and symmetrical treatment of foreign and domestic airlines in the taxation of sales of fuel purchased within a state.¹⁹⁵

agreements. Iceland, for example, expressed the fear that the tax might force her carriers to seek alternative destinations. *Id.* at app. 27a.

¹⁹¹ The notes emphasize the spirit of reciprocity that is the basis for international air operations. *Id.* at app. 31a.

¹⁹² See *Delta Air Lines, Inc. v. Florida Department of Revenue*, 445 So. 2d 317 (Fla. 1984), *cert. denied*, 106 S. Ct. 214 (1986). Delta Airlines, Capitol Air, Northwest Airlines, Ozark Air Lines, Piedmont Aviation, Republic Airlines, The Flying Tigers, United Airlines and USAir challenged Florida's fuel tax as an unconstitutional violation of the Commerce Clause. The Florida Supreme Court upheld the tax as applied to domestic carriers, and the United States Supreme Court refused to hear the case.

¹⁹³ Brief for Appellee at 5, *Wardair Canada, Inc. v. Florida Dep't of Revenue*, 106 S. Ct. 2369 (1986) [hereinafter Brief for Appellee].

¹⁹⁴ For a discussion of the *Complete Auto* standard, see *supra* notes 80-83 and accompanying text.

¹⁹⁵ Brief for Appellee, *supra* note 193, at 5. According to the *Complete Auto* standard, a tax is unconstitutional if it discriminates against interstate commerce. In

The Court considered the tax to be clearly neutral in its treatment of foreign airlines and consistent with the Commerce Clause objective of non-discriminatory treatment of interstate carriers.¹⁹⁶

The decision also represented a realistic approach to local governments' need to raise revenue for the maintenance of airports. Florida's need for state collection of revenue to keep local airports self-sufficient was balanced against the need for federal uniformity, resulting in a practical approach to raising revenue. Prior to the 1973 OPEC oil embargo, fuel was inexpensive and readily available, and state taxing authorities had little reason to regard international aviation as a potential source of revenue.¹⁹⁷ The price of fuel has risen roughly 700% since the OPEC oil embargo, and states realized that they could use a sales tax on an essential commodity to combat the increasing costs of airport maintenance and development.¹⁹⁸

Regardless of whether the decision in *Wardair* was a positive move toward equality of treatment for all air carriers or a retaliatory response to Canadian taxation of fuel, the case will inevitably impact the international community. The holding will place the United States in conflict with the spirit of the international agreements and the established international practice of providing exemptions from fuel taxes. The Court has unmistakably found congressional intent to reserve to the states a primary source of revenue; however, the decision in *Wardair* may

this case, Florida taxed foreign carriers at the same rate that it taxed domestic carriers. *Id.*

¹⁹⁶ See *id.* at 5-6. *Wardair* argued that the tax operated "automatically" to the disadvantage of foreign carriers. The Court, however, found that foreign carriers were treated equally since the tax was applied evenly to all carriers. *Id.*

¹⁹⁷ See Amicus Curiae Brief, *supra* note 4, at 18.

¹⁹⁸ *Id.* at 18-19. The price of bonded fuel rose sharply following the OPEC embargo because bonded fuel must be manufactured from crude oil purchased abroad. In contrast, the price of fuel manufactured from domestic crude oil dropped, and foreign carriers began to shift from bonded fuel to domestically produced aviation kerosene. As domestic consumption increased, the states recognized that this newly created market could provide a source of revenue. *Id.* at 18 n.21.

prove to be detrimental to the overall development of international aviation, and may also result in a confusing administrative situation with the possibility of widespread aviation fuel taxes on worldwide basis.

Nancy Dearing

FEDERAL AVIATION ACT — GRANT OF EXCLUSIVE RIGHT TO OPERATE AT A FEDERALLY FUNDED AIRPORT — Imposition of uniquely discriminatory lease provisions on applicants for airport space grants incumbent airport lessees an exclusive right to operate at a federally funded airport in violation of section 1349(a) of the Federal Aviation Act. *City of Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985).

On May 30, 1979, aviator James Brettman filed an application with the city of Pompano Beach, Florida, requesting permission to lease ten to twelve acres at the Pompano Beach Air Park (Air Park).¹ Pursuant to the city's minimum standards, Brettman planned to rent hangar and storage space to the owners of small, single and twin-engine airplanes.² The city responded to Brettman's

¹ *City of Pompano Beach v. FAA*, 774 F.2d 1529, 1532 (11th Cir. 1985). Pompano Beach received title to the Air Park, originally a World War II Naval facility, pursuant to the Surplus Property Act of 1944, 50 U.S.C. app. § 1622(g) (1982). Section 1622(g) provides that "[n]o exclusive right for the use of the airport at which the property disposed of is located shall be vested (either directly or indirectly) in any person or persons to the exclusion of others in the same class." *Id.*

The city's deed to the Air Park also specified that the land "shall be used for public airport purposes, and only such purposes, on reasonable terms and without unjust discrimination and without grant or exercise of any exclusive right for use of the airport within the meaning of Section 303 of the Civil Aeronautics Act of 1938." *Pompano Beach*, 774 F.2d at 1532 n.3. Section 303 has since been re-enacted and codified in the Federal Aviation Act at 49 U.S.C. app. § 1349(a) (1982). See *infra* text accompanying notes 29-38 for the origins and purpose of section 303.

In *Pompano Beach*, the Administrator of the Federal Aviation Administration (FAA) chose to pursue a remedy under the Federal Aviation Act of 1958, § 308(a) (codified at 49 U.S.C. app. § 1349(a) (1982)), rather than under section 1622(g) or the deed of conveyance. 774 F.2d at 1532 n.3. Therefore, the focus of this analysis is section 1349(a).

² *Pompano Beach*, 774 F.2d at 1532. At the time of Brettman's application, there were two fixed base operators (FBOs) at the Air Park providing hangar facilities for rent: Pompano Aviation and Pompano Air Center. Pompano Aviation was bought out by Executive Aviation two months later, and finally became Bec-Air in September, 1981. *Id.* at 1535. John Becker, owner of Pompano Air Center and

request by revising its minimum standards³ such that an Air Park tenant could not rent out hangar space unless it provided the full range of fixed-base operator (FBO)⁴ services.⁵ Thus began a course of conduct⁶ by the city of

father of Brian Becker, owner of Bec-Air, thought it unfair that Brettman be allowed to operate hangar rentals without providing the full range of services maintained by the incumbent lessees: fuel service, parking facilities, line service, and a flight school. *Id.* at 1533. Becker protested to the Pompano Beach Advisory Board (Advisory Board), the organization initially responsible for approving Brettman's application, that Brettman would siphon the incumbents' lucrative hangar business while leaving them with the other, less profitable services. *Id.*

³ *Id.* at 1533 n.6. Prior to Brettman's request, the minimum standards used by Pompano Beach to regulate the activities of Air Park tenants and fixed base operators had remained unchanged since 1967. The Air Park manager stated that revised standards had been under development for some time, and on July 26, 1979, just two months after Brettman's original lease application, the Pompano Beach City Commission officially adopted a new set of minimum standards. Two days later, however, the city signed a new lease with Executive Aviation, later to become Bec-Air (*see supra* note 2), which required adherence only to the 1967 standards. *Id.* at 1533.

⁴ A fixed base operation (FBO) is defined as one that "provides facilities, fuel, equipment, supplies and services at an airport which are used by aircraft, crews, passengers and in handling freight connected therewith. It is vital to air transportation." *Alphin v. Henson*, 392 F. Supp. 813, 816 n.4 (D. Md. 1975), *aff'd*, 538 F.2d 85 (4th Cir. 1976), *modified on other grounds*, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977) (quoting *E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52, 53 n.2 (1st Cir. 1966)).

⁵ *Pompano Beach*, 774 F.2d at 1533; *see supra* note 2 for a discussion of the services offered at the Air Park by incumbent FBOs.

⁶ Although the Advisory Board approved Brettman's application on September 11, 1979, the city notified Brettman that in order to qualify under its revised minimum standards, *see supra* note 3 for background information on the city's revised standards, Brettman had to operate as a FBO under one of five designated categories. *Pompano Beach*, 774 F.2d at 1534. Brettman complied by requesting a lease under the "flight instructor" category and proposed a thirty-year term with a required minimum investment of \$150,000. *Id.* The city counteroffered its "standard" lease: a new lease containing requirements not found in existing FBO leases. *Id.*; *see infra* note 24 for a list of the more restrictive clauses contained in the "standard lease."

On February 10, 1981, after one year of futile negotiations, Brettman modified his application and asked to operate at the Air Park as a full FBO on the same terms as the two incumbent lessees. *Pompano Beach*, 774 F.2d at 1534. Pompano Beach offered a twenty-year lease with a required investment of \$200,000, and conditioned acceptance on proof of Brettman's "financial responsibility." *Id.*; *see infra* note 9 for a breakdown of the type of financial information requested. Brettman counteroffered a lease identical to those held by Pompano Air Center and Bec-Air and the city flatly refused to consider it. *Pompano Beach*, 774 F.2d at 1534. On June 23, 1981, the City Attorney wrote Brettman that he planned to take no further action on Brettman's request. The Air Park manager advised Brettman to "search for another airport with which to do business." *Id.*

Pompano Beach which effectively thwarted Brettman's attempts to gain access to the Air Park for over three years.⁷

From late 1979 to early 1983, in addition to changing its minimum standards, the city developed a new "standard" lease,⁸ requested that Brettman make detailed financial disclosures,⁹ and refused to offer Brettman a lease identical to those held by the two incumbent lessees, Pompano Air Center and Bec-Air.¹⁰ Based on the city's treatment of Brettman, the Federal Aviation Administration (FAA) issued a "Notice of Proposed Order" finding the city in violation of federal law.¹¹ Spurred to action, Pompano Beach officials went to Washington, D. C., to

⁷ Brettman first requested access to the Air Park on May 30, 1979. The FAA ordered Pompano Beach to offer him a non-discriminatory lease in the spring of 1984. *Pompano Beach*, 774 F.2d at 1532, 1538.

⁸ *Id.* at 1535; see *infra* notes 19 and 23 for a discussion of the FAA's findings with regard to the city's "standard" lease. Though the city called this lease its "standard" lease, it had been modified three times since 1977. *Pompano Beach*, 774 F.2d at 1535. The city claimed that the changes were made to incorporate its "evolving concerns," and thus to ultimately protect the public interest. *Id.*

⁹ *Pompano Beach*, 774 F.2d at 1534. The city requested detailed financial information concerning Brettman's proposed fixed base operation, including projected gross revenues and operating costs for each year of the lease, pricing policies, and a proposed schedule of charges. *Id.* at 1535.

¹⁰ *Id.* at 1534; see *supra* note 2 for background information on the incumbent lessees, Pompano Air Center and Bec-Air. Pompano Air Center and Bec-Air had been operated essentially as a single business entity. Bec-Air provides no mechanical services or maintenance to aircraft, and refers all repair work to Pompano Air Center. The only aeronautical service Bec-Air provides is fuel. In contrast, Pompano Air Center provides a wide range of services, including flight instruction, aircraft maintenance, fuel, oil, rental hangar storage space, outside aircraft tiedown, and aircraft sales, and employs a staff of thirty to fifty persons. Bec-Air employs only a clerk and two line persons, none of whom holds a professional Federal Aviation Administration (FAA) certificate. *Pompano Beach*, 774 F.2d at 1535-36.

¹¹ *Pompano Beach*, 774 F.2d at 1535. Specifically, the FAA charged Pompano Beach with having unjustly discriminated against Brettman and having, in effect, granted an exclusive right to the Beckers. *Id.* at 1535-36. The FAA's investigation was instigated by Brettman, who filed a complaint with the FAA in July of 1981, two years after his initial lease application. *Id.* at 1534. See *infra* note 22 for a detailed discussion of Brettman's communications with the FAA. The FAA further warned the city that as a result of its conduct it faced several possible sanctions, including ineligibility for future federal funding of the Air Park, imposition of a civil penalty pursuant to 49 U.S.C. app. § 1471(a) (1982), and loss of necessary FAA approval on matters related to the use of the Air Park. *Pompano Beach*, 774 F.2d at 1536.

defend their actions before FAA representatives.¹² The FAA subsequently reviewed the city's "standard" lease, the lease that Brettman had rejected several times before,¹³ and found the lease to "appear . . . reasonable and not unjustly discriminatory."¹⁴ It withdrew its "Notice of Proposed Order," but the withdrawal was contingent on the city's promise to once again offer Brettman the approved "standard" lease and to negotiate the financial terms, such as the amount of minimum investment required, in good faith.¹⁵

Immediately thereafter, the city offered Brettman a thirty-year lease and requested a minimum investment in capital improvements of \$500,000.¹⁶ FBOs operating at the Air Park at the time had thirty-year leases which required minimum investments of no more than \$200,000.¹⁷ City officials told Brettman that the required investment would be reduced *only* if he agreed to a shorter

¹² *Pompano Beach*, 774 F.2d at 1536. City officials contacted their congressmen and arranged for a meeting with FAA officials in one congressman's Washington, D. C., office. *Id.* Brettman was not notified of the meeting, and later contended it was an illegal *ex parte* attempt by Pompano Beach to influence the FAA's decision on its "Proposed Order." Brief for Intervenor at 17, *City of Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985) (No. 84-5331).

¹³ *Pompano Beach*, 774 F.2d at 1536. The city offered Brettman its "standard" lease at least four times: in December 1980, February 1981, November 1981, and April 1982. Each offer consisted of a twenty-year term with a required minimum investment of \$200,000. *Id.* at 1534.

¹⁴ *Id.* at 1536.

¹⁵ *Id.* at 1537. "Financial terms" were defined as including "those terms of the Lease which may have a direct impact on the financial viability of Mr. Brettman's proposed operation and on his ability to compete on an equal basis with the existing operators." Brief of Petitioner at 9, *City of Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985) (No. 84-5331)[hereinafter Brief of Petitioner]. The FAA recommended that any financial terms required by the city be "reasonable and not unjustly discriminatory when compared to the financial terms of existing (fixed base operator) leases at the airport." *Pompano Beach*, 774 F.2d at 1536.

¹⁶ *Pompano Beach*, 774 F.2d at 1537.

¹⁷ *Id.* at 1532, 1535. Pompano Beach claimed that, adjusted for inflation, Pompano Air Center had made a cumulative investment at the Air Park of \$1,016,781 and Bec-Air had made a cumulative investment of \$550,060. *Id.* at 1536 n.8. However, Pompano Air Center's thirty-year lease expressly required only a minimum investment of \$200,000, while Bec-Air's required only \$100,000. *Id.* at 1532, 1535.

lease term.¹⁸ Additionally, the city's revised minimum standards, several of which changed the lease significantly,¹⁹ were attached to the lease.²⁰ Although incorporated into the lease by reference, the standards themselves had not been submitted to the FAA.²¹

Prompted by Brettman, the FAA notified Pompano Beach that it did not feel the city was fulfilling its obligations.²² Pompano Beach disagreed, and on October 27, 1983, the FAA reissued its "Notice of Proposed Order."²³ After a four day administrative hearing held in February of 1984, the FAA found the lease offered Brettman to contain provisions different from the leases offered other lessees, and deemed it, therefore, discriminatory to Brettman.²⁴ The FAA's hearing officer concluded that the

¹⁸ *Id.* at 1537.

¹⁹ See *infra* note 24 for a complete listing of the lease provisions that the FAA hearing officer found to differ significantly. They include provisions relating to transfer of control of the leased space, compliance with future standards, requirement of an initial deposit, disclosure of financial information and business plans (see *supra* note 9), gasoline taxes, amount of the required investment (see *supra* note 15 and accompanying text), effect of bankruptcy and liens on lease, advance city approval of future construction, and the rental rate. *Pompano Beach*, 774 F.2d at 1537.

²⁰ *Pompano Beach*, 774 F.2d at 1537; see *supra* note 3 and accompanying text for a discussion of the city's efforts to revise its minimum standards.

²¹ *Pompano Beach*, 774 F.2d at 1537. The city claimed that the omission of the revised standards was an oversight and not intentional. Brief of Petitioner, *supra* note 15, at 12-13.

²² *Pompano Beach*, 774 F.2d at 1537. Brettman originally contacted the FAA in June of 1979, shortly after his first application was tabled by the Advisory Board. After the city refused to offer him a full FBO lease in the spring of 1981, Brettman then filed a complaint pursuant to 14 C.F.R. § 13.5(a) (1986) ("Any person may file a complaint with the [Federal Aviation] Administrator with respect to anything done . . . in contravention of any provision of any Act . . . within the jurisdiction of the Administrator") which led to the "Notice of Proposed Order" and subsequent meeting between Pompano Beach and the FAA. See *supra* text accompanying notes 11-15 for a discussion of the FAA's proposed order and subsequent investigation of Brettman's complaint. Finally, Brettman informed the FAA that the city had offered him the approved lease, but had also added the unapproved revised standards. *Pompano Beach*, 774 F.2d at 1537.

²³ *Pompano Beach*, 774 F.2d at 1537.

²⁴ *Id.* at 1537-38 n.9. The hearing officer specifically found ten aspects of the lease to be discriminatory:

(1) Amount of investment in capital improvements required of Brettman as dis-

city had granted an "exclusive right"²⁵ in violation of section 1349(a) of the Federal Aviation Act.²⁶ As a result, the FAA ordered the city to cease unjustly discriminating against Brettman and to offer him a lease containing provisions "substantially identical" to those held by incumbent FBOs.²⁷ Pompano Beach petitioned the United States Court of Appeals for the Eleventh Circuit for review, requesting that the order be vacated.²⁸ *Held, and affirmed*: Imposition of uniquely discriminatory lease provisions on applicants for airport space grants incumbent airport lessees an exclusive right to operate at a federally funded airport in violation of section 1349(a) of the Federal Aviation Act. *City of Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985).

tinguished from the amount required of other fixed base operators at the Air Park;

(2) Changes and modifications, and their interpretation, of the "standards" and "guidelines" attached to Brettman's lease;

(3) Transfer of control of Brettman's business or property, and lease conditions limiting the sale, assignment, and/or sublease of the business or property;

(4) Compliance with minimum standards and future-imposed standards required of Brettman but not other lessees;

(5) Disclosure of confidential commercially valuable business information required of Brettman while other lessees exempted from that obligation;

(6) Brettman was required to operate a fixed base facility before being allowed to rent hangar space, and was required under the city's standards to operate in more than one category;

(7) Approval of several city administrative authorities required by Brettman before he could construct new facilities, when such approval not required by others;

(8) Discriminatory gasoline tax provisions imposed on Brettman;

(9) Deposit required by Brettman and not by others;

(10) Bankruptcy, lien and rental rate provisions of Brettman's lease unlike the provisions contained in existing leases.

Id. at 1537 n.9.

²⁵ See *infra* text accompanying notes 29-143 for a discussion of the legal interpretation of "exclusive right" as used in section 1349(a) before the *Pompano Beach* decision.

²⁶ 49 U.S.C. app. § 1349(a) (1982); *Pompano Beach*, 774 F.2d at 1538.

²⁷ *Pompano Beach*, 774 F.2d at 1538. The term "substantially identical" was not specifically defined; see *id.*

²⁸ *Id.*

I. INTERPRETATION OF SECTION 1349(A)'S "EXCLUSIVE RIGHT"

A. *Legislative and Administrative Pronouncements*

Congress originally passed section 1349(a)²⁹ into law as § 303 of the Civil Aeronautics Act of 1938 (CAB Act).³⁰ It viewed the aviation industry as a vital part of the nation's transportation system, and, therefore, "invested with the public interest."³¹ Accordingly, the goal of the CAB Act was to promote the development, safety, and regulation of civil aeronautics.³² The Act created the Civil Aeronau-

²⁹ 49 U.S.C. app. § 1349(a) (1982). Section 1349(a) provides in relevant part: There shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended. For the purposes of the preceding sentence, the providing of services at an airport by a single fixed-base operator shall not be construed as an exclusive right if it would be unreasonably costly, burdensome, or impractical for more than one fixed-base operator to provide such services, and if allowing more than one fixed-base operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such fixed-base operator and such airport.

Id.

³⁰ Civil Aeronautics Act of 1938, ch. 601, § 303, 52 Stat. 973, 986 (current version at 49 U.S.C. app. § 1349(a) (1982)) [hereinafter CAB Act]; see also Pompano Beach, 774 F.2d at 1541. See generally Lindsey, *The Legislative Development of Civil Aviation, 1938-1958*, 28 J. AIR. L. & COM. 18 (1961) (background information on the CAB Act and subsequent legislation).

Section 303 of the CAB Act was listed under Title III of the Act as one of the "Powers and Duties of Administrator." The essence of section 303 is that no federal funds are to be expended on air navigation facilities and landing areas without the written recommendation of the Administrator. CAB Act, *supra* note 30 at § 303, 52 Stat. at 986. The "exclusive right" prohibition was added with no express direction given for its subsequent enforcement. See, e.g., *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F. Supp. 667 (N.D. Ga. 1982) (in determining whether Congress intended section 1349(a) to provide a private cause of action against entities granted exclusive rights, the court noted that Congress had not expressly designated beneficiaries of section 1349(a) and, in the court's view, the provision was meant to "inure to the benefit of the general public").

³¹ Beane, *The Antitrust Implications of Airline Deregulation*, 45 J. AIR L. & COM. 1001, 1001-02 (1980).

³² CAB Act, *supra* note 30 at § 2, 52 Stat. at 980. Section 2 of the CAB Act declares the policy behind the Act to be as follows:

Sec. 2. In the exercise and performance of its powers and duties under this Act, the Authority shall consider the following among other things, as being in the public interest, and in accordance with the public convenience and necessity —

tics Authority (CAA) and, though safety was the CAB Act's primary goal, the CAA was charged with the duty to encourage and develop a national air transportation system.³³ The CAA was to adapt the system to present and future needs of the foreign and domestic commerce of the United States.³⁴

Along with the duty to adapt, the CAA was granted the corresponding ability to authorize expenditure of federal funds for the development of air navigation facilities and landing areas.³⁵ Section 303 of the CAB Act provided

-
- (a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States . . . ;
 - (b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;
 - (c) The promotion of adequate, economical, and efficient service by carriers at reasonable charges, *without unjust discriminations, undue preferences or advantages*, or unfair or destructive competitive practices;
 - (d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States . . . ;
 - (e) The regulation of air commerce in such manner as to best promote its development and safety; and
 - (f) The encouragement and development of civil aeronautics.

Id. (emphasis added).

³³ *Id.*

³⁴ Beane, *supra* note 31, at 1002.

³⁵ CAB Act, *supra* note 30 at § 303, 52 Stat. at 986 (codified as amended at 49 U.S.C. app. § 1349(a)). "Air navigation facility" and "landing area" were defined as follows in section 1 of the CAB Act:

"Air navigation facility" means *any facility used in*, available for use in, or designed for use in, *aid of air navigation*, including landing areas, lights, any apparatus or equipment for disseminating weather information, for signaling, for radio-directional finding, or for radio or other electrical communication, and any other structure or mechanism having a similar purpose for guiding or controlling flight in the air or the landing and take-off of aircraft. . . .

"Landing area" means *any locality*, either of land or water, including airports and intermediate landing fields, which is *used*, or intended to be used, *for the landing and take-off of aircraft*, whether or not facilities are provided for the shelter, servicing, or repair of aircraft, or for receiving or discharging passengers or cargo.

that such funds be approved for any landing area or facility deemed "reasonably necessary" for use in air commerce,³⁶ but limited the CAA's right to grant funds by stipulating that "[t]here shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended."³⁷ Section 302(a), which addressed the CAA's duty to establish and maintain civil airways in particular, concluded with similar language: "No exclusive rights shall be granted for the use of any civil airway, landing area, or other navigation facility."³⁸

In October, 1940, two years after the CAB Act took effect, Congress appropriated funds for the construction, improvement and repair of up to two hundred and fifty public airports.³⁹ Because some of the airports targeted

CAB Act, *supra* note 30 at § 1, 52 Stat. at 977, 979 (emphasis added).

³⁶ CAB Act, *supra* note 30 at § 303, 52 Stat. at 986. The term "reasonably necessary" was not defined. See *id.*

³⁷ *Id.* Congress did not indicate what effect the "exclusive right" language was to have. For a discussion of the Congressional intent behind section 303, see *supra* note 30. For discussion of the judicial interpretation given "exclusive right" before the *Pompano Beach* decision, see *infra* notes 73-143 and accompanying text. For a discussion of judicial decisions finding that Congress did not intend section 303 of the CAB Act to provide a private cause of action, see *infra* notes 73-79 and accompanying text.

³⁸ CAB Act, *supra* note 30 at § 302(a), 52 Stat. at 985. The relevant text of section 302(a) reads as follows:

The Administrator is empowered to designate and establish civil airways and, within the limits of available appropriations made by Congress, (1) to acquire, establish, operate, and maintain along such airways all necessary air navigation facilities; . . . and (4) to provide necessary facilities and personnel for the regulation and protection of air traffic moving in air commerce: *Provided*, . . . *No exclusive right shall be granted for the use of any civil airway, landing area or other air navigation facility.*

Id. (emphasis added). "Civil Airway" was defined in section 1 of the CAB Act to mean "a path through the navigable air space of the United States, identified by an area on the surface of the earth, designated or approved by the Administrator as suitable for interstate, overseas, or foreign air commerce." *Id.* at § 1, 52 Stat. at 978. For the definitions of "air navigation facility" and "landing area" as used in the CAB Act, see *supra* note 35.

³⁹ First Supplemental Civil Functions Appropriation Act, ch. 780, 54 Stat. 1030, 1039 (1940)[hereinafter Appropriation Act]. The Appropriation Act provided in pertinent part:

Development of landing areas: For the construction, improvement,

for funding had outstanding contracts granting exclusive rights, the Secretary of Commerce asked the U.S. Attorney General to interpret Section 303.⁴⁰ Specifically, the issue was whether an exclusive right to use an airport for a particular aeronautical activity constituted an "exclusive right" as contemplated by the CAB Act.⁴¹ The Attorney General responded that, in his view, Congress clearly did not intend the term "exclusive right" to apply only to the exclusive use of an airport for all purposes.⁴² Further he

and repair of not to exceed two hundred and fifty public airports and other public landing areas in the United States and its territories and possessions, determined by the administrator . . . to be necessary for national defense, including area essential for safe approaches and including the acquisition of land

Id.

⁴⁰ 40 Op. Att'y Gen. 71, 72 (1941).

⁴¹ *Id.* After reproducing the text of section 303 of the CAB Act (currently codified as amended at 49 U.S.C. app. § 1349(a) (1982)), the Attorney General began his opinion as follows:

The last sentence of this section declares that "there shall be no exclusive right for the use of any landing area or air navigation facility upon which Federal funds have been expended." Funds for the construction, improvement and repair of not to exceed 250 "public airports and other public landing areas" have been appropriated The Acting Secretary [of Commerce] states that these funds are being expended, by the Administrator of Civil Aeronautics under the [CAB Act] and that some airports which he desires to develop in his current program have "outstanding contracts and leases granting exclusive rights" to conduct at those airports particular "aeronautical activities, such as air carriers, charter operators and flying schools." It further appears that similar contracts and leases have also been found at airports subject to the provisions of section 303 upon which other Federal funds have been expended, or are being expended. The question which the administrator is required to determine and upon which my advice is desired is *whether an exclusive right to use an airport for a particular aeronautical activity, such as an air carrier, is an "exclusive right for the use of any landing area" within the meaning of section 303.*

Id. at 72 (emphasis added).

⁴² *Id.* at 72-73. The Attorney General stated:

It seems very doubtful that the term "exclusive right for the use of any landing area" was intended to apply only to the use of an airport for all aeronautical purposes or to the total of all the aeronautical uses to which it is or may be devoted. Under such a construction the grant to one person of the exclusive right to use an airport for air carrier service would be permissible as long as another person or other persons used or were authorized to use it for other aeronautical activities. But this construction would give a monopoly at the

felt that it was "clear" that the term "exclusive right" as used in section 303 was intended to describe a "[p]ower privilege, or other right excluding or debarring another or others from enjoying or exercising a like power, privilege, or right."⁴³ The Attorney General noted finally that the "mini-monopolies" that would develop as a result of a narrow interpretation of section 303 would contravene what he saw as an explicit Congressional mandate: to prohibit monopolies and combinations in restraint of trade, and to promote and encourage competition in civil aeronautics.⁴⁴

The Federal Aviation Act of 1958 (Aviation Act)⁴⁵ extensively modified and reenacted the earlier CAB Act.⁴⁶ Section 303 was incorporated into the Aviation Act without change as section 408. The legislative history of the Aviation Act indicates that courts must consider reenactment of unchanged provisions of the CAB Act as a neutral

airport to the air carrier operator and thus would frustrate the purpose of the limitation upon the use of Federal funds. I find nothing in the language of the statute or its history requiring such a construction. *The provision is clearly applicable to any right for the use of a landing area or an airport in civil aeronautics which is exclusive in character.*

Id. (emphasis added).

⁴³ *Id.* at 72. This definition of "exclusive right" was adopted by the FAA in an advisory circular it published in 1972. See *infra* notes 58-68 and accompanying text for a discussion of the advisory circular. The Attorney General's definition was also quoted in *Niswonger v. American Aviation, Inc.*, 411 F. Supp. 763 (E.D. Tenn. 1975) (see *infra* notes 133-143 and accompanying text for a discussion of *Niswonger*) and *City of Pompano Beach v. FAA*, 774 F.2d 1529 (11th Cir. 1985) (see *infra* notes 150-153 and accompanying text for a discussion of the Attorney General's opinion as used in *Pompano Beach*).

⁴⁴ 40 Op. Att'y Gen. at 72.

This meaning is confirmed by the legislative history which shows that the purpose of the provision is to prohibit monopolies and combinations in restraint of trade or commerce and to promote and encourage competition in civil aeronautics in accordance with the policy of the act (sec.2). Cong. Rec., v. 83, pp. 6729, 6730. See, also, section 302(a) of the statute . . .

Id. For the relevant text of section 302(a) of the CAB Act, see *supra* note 38.

⁴⁵ Federal Aviation Act of 1958, Pub. L. No. 85-726, § 308(a), 72 Stat. 731 (codified as amended at 49 U.S.C. §§ 1301-1542, 1349(a) (1982)) [hereinafter Aviation Act].

⁴⁶ *Pompano Beach*, 774 F.2d at 1531, 1541. See generally Rider, *A Chronological Listing of Legislation Affecting Civil Aviation, 1938 - 1980*, 47 J. AIR L. & COM. 257 (1982) (background information on the Aviation Act).

factor in any subsequent questions of interpretation.⁴⁷ Further, the legislative history shows that the drafters did not intend to adopt or reject prior judicial decisions or administrative interpretations such as the 1941 Attorney General's Opinion.⁴⁸

The Airport and Airway Development Act of 1970 (Development Act)⁴⁹ again changed the legislative framework governing the aviation industry. A burgeoning economy and growing U. S. population necessitated increased federal funding for the development and modernization of airports and related facilities.⁵⁰ Section 18 of the Development Act, codified first at section 1718, then, after passage of the Airport and Airway Improvement Act of 1982,⁵¹ superceded by section 2210, lists several require-

⁴⁷ Aviation Act, *supra* note 45, 72 Stat. at 735. In the published legislative history of the Aviation Act, Congress included a section entitled "Effect of Repeals and Reenactment." The section stated:

The reenactment of provisions which are now in effect should be considered . . . as an *absolute neutral factor* in any question of interpretation which may arise in the future From the standpoint of the continuity of the provisions of law involved in this legislation, insofar as they are not changed from the provisions of law being repealed, it is intended that the reenactment of such provisions shall be considered to have the same effect as though the new act were amending the Civil Aeronautics Act of 1938 to "read as follows."

Id. (emphasis added).

⁴⁸ *Id.* "In proposing this legislation it is not the intention of the committee to either adopt or reject administrative interpretations or practices, or judicial decisions under present law." *Id.*

⁴⁹ Airport and Airway Development Act of 1970, Pub. L. No. 91-258, 84 Stat. 219 [hereinafter Development Act].

⁵⁰ *Sellfors v. United States*, 697 F.2d 1362, 1366 (11th Cir. 1983), *cert. denied*, 468 U.S. 1204 (1984) (holding that the Development Act does not create a statutory duty on the part of the United States to protect third parties using federally funded airports). In *Sellfors*, the Eleventh Circuit stated:

The [Development Act] was passed for the principal purpose of providing "for the expansion and improvement of the nation's airport and airway system" This was necessitated by the burgeoning United States economy and population which suffered from the lack of a national system of adequate airport facilities. Neither the legislative history nor the ADA itself reflects any congressional intent that the Act create duties on the part of the federal government owing to private individuals using sponsored airport facilities.

Id. at 1366 (citation omitted).

⁵¹ 49 U.S.C. § 1718 (1982), *superceded by* Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, § 523(a), 96 Stat. 695 (1982) (codified at 49 U.S.C.

ments to be performed as a condition precedent to approval of airport development projects.⁵² The first requires that before an airport can be eligible for public funding, it must "be available for public use on fair and reasonable terms and without unjust discrimination"⁵³ The second requirement, added in 1982, mirrors the "exclusive right" language of section 1349(a) almost completely.⁵⁴ Although Congress designed sections 1718 and 2210 to regulate the development, as opposed to the

app. § 2210 (1982)). Section 1718 was originally enacted as section 11 of the Federal Airport Act of 1946, ch. 251, 60 Stat. 170, which was repealed by section 52(a) of the Development Act; *see supra* note 49.

⁵² 49 U.S.C. app. § 2210(a)(1)-(13) (1982). Section 2210 lists thirteen requirements that must be met before the Secretary of Transportation (the successor to the Civil Aeronautics Authority and the Administrator of the FAA) can approve an airport development project. The requirements most important to a discussion of section 1349(a) are reproduced at *infra* notes 53 and 54.

⁵³ 49 U.S.C. app. § 2210(a)(1) (1982). Section 2210(a)(1) states:

As a condition precedent to approval of an airport development project . . . the Secretary shall receive assurances, in writing, . . . that — (1) the airport to which the project relates will be available for public use on *fair and reasonable terms and without unjust discrimination*, including the requirement that (A) each air carrier using such airport . . . shall be subject to such nondiscriminatory and substantially comparable rates, . . . and . . . rules . . . as are applicable to all such air carriers which make similar use of such airport . . . and (B) *each fixed-based operator at any airport shall be subject to the same rates . . . as are uniformly applicable to all other fixed-based operators making the same or similar use of such airport . . . and (C) each air carrier using such airport shall have the right to service itself or to use any fixed-based operator that is authorized by the airport or permitted by the airport to serve any air carrier at such airport.*

Id. (emphasis added).

⁵⁴ 49 U.S.C. app. § 2210(a)(2) (1982). Section 2210(a)(2) provides:

There will be no exclusive right for the use of an airport by any person providing, or intending to provide, aeronautical services to the public. For purposes of this paragraph, *the providing of services at an airport by a single fixed-based operator shall not be construed as an exclusive right if it would be unreasonably costly, burdensome or impractical for more than one fixed-based operator to provide such services, and if allowing more than one fixed-based operator to provide such services would require the reduction of space leased pursuant to an existing agreement between such single fixed-based operator and such airport.*

Id. (emphasis added). Note that the second sentence is virtually identical to the last sentence of section 1349(a). Both were added in 1982 by the Airport and Airway Improvement Act of 1982, *supra* note 51. *See supra* note 29 for the relevant text of section 1349(a).

operation, of airports,⁵⁵ at least one party denied access to airport space has claimed alleged discriminatory conduct to violate section 1718 (now section 2210) as well as section 1349(a).⁵⁶ In this respect, sections 1718 and 2210, as well as the judicial decisions interpreting them,⁵⁷ may serve as precedent for future interpretations of section 1349(a).

In 1972, the Federal Aviation Administration issued an advisory circular formulating its interpretation of section

⁵⁵ *Sellfors*, 697 F.2d at 1366. "The purpose of the Act is to provide federal funds for use in developing and modernizing airports and related facilities in conjunction with a national transportation policy and other national concerns of efficient and non-discriminatory use of such monies. *It was not intended to regulate operations of airports.*" *Id.* (emphasis added).

⁵⁶ *Dallas v. Southwest Airlines Co.*, 371 F. Supp. 1015 (N.D. Tex.), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1973). In *Southwest Airlines*, both the plaintiffs and defendant relied upon sections 1718 (now section 2210) and 1349(a). The plaintiffs, the cities of Dallas and Fort Worth, Texas, were in the process of moving all interstate air service from their municipal airports (Love Field in Dallas and Greater Southwest International in Fort Worth) to the new Dallas-Fort Worth Regional Airport. Southwest Airlines was the only purely intrastate air carrier operating in the Dallas-Fort Worth area at the time of the move. It wished to remain at Love Field where the interstate air carriers were allowed to continue their intrastate commuter services. *Id.* at 1019. The cities sought a declaratory judgment that they had the right under federal law (including sections 1718 and 1349(a)) to exclude Southwest from Love Field after the opening of the new regional airport. *Id.* Southwest counterclaimed for a declaration of its right under federal law (including sections 1718 and 1349(a)) to remain at Love Field, and for an injunction to protect that right. *Id.* The plaintiffs argued that since both Love Field and the regional airport had received federal funds from federal aid programs, the cities were required to exclude Southwest from Love Field in order to not unjustly discriminate against the interstate air carriers who had been relocated to the regional airport. *Id.* at 1023. The court ultimately held in favor of Southwest, stating: "On the facts herein, the Court must conclude that a prima facie case of 'unjust discrimination' and of the illegal grant of an 'exclusive right' has been established and that plaintiffs' purported justifications therefor are inadequate." *Id.* at 1030; see *infra* notes 93-132 for a discussion of the holding in *Southwest Airlines*; see also *infra* notes 158-160 for a discussion of the use of *Southwest Airlines* in *Pompano Beach*; see *infra* note 107 for a discussion of how the court in *Southwest Airlines* disposed of the plaintiffs' complaint.

⁵⁷ At the present, section 1718 has only been interpreted by one major case: *Southwest Airlines*, 371 F. Supp. at 1015; see *supra* note 56 for a discussion of section 1718 as used in *Southwest Airlines*. Section 2210, the successor to section 1718, has not yet been judicially interpreted, although the Eleventh Circuit has held that it does not create a private cause of action. *Arrow Airways, Inc. v. Dade County*, 749 F.2d 1489 (11th Cir. 1985). For a discussion of the cases holding that section 1349(a) also does not create a private cause of action, see *infra* notes 73-79 and accompanying text.

1349(a).⁵⁸ Since the FAA is responsible for ensuring compliance with the Federal Aviation Act,⁵⁹ and section 1349(a) is a "statute committed to the FAA for its administration,"⁶⁰ courts view the FAA's interpretations of the Federal Aviation Act as highly persuasive authority.⁶¹ A few of the courts that have interpreted section 1349(a) have specifically relied on this advisory circular.⁶² In the circular, an "exclusive right" is defined as "[a] power, privilege, or other right excluding or debarring another from enjoying or exercising a like power, privilege, or right."⁶³ Further, an "exclusive right" can be conferred, according to the circular, by express agreement, imposition of unreasonable standards or requirements, or any other means.⁶⁴ The circular, therefore, gives the term

⁵⁸ FAA Advisory Circular No. 150/5190-2A (April 4, 1972), *relevant sections reprinted in* *Alphin v. Henson*, 392 F. Supp. 813, 832-33 (D. Md. 1975), *aff'd*, 538 F.2d 85 (4th Cir.), *modified on other grounds*, 552 F.2d 1033 (4th Cir. 1976), *cert. denied*, 434 U.S. 823 (1977).

⁵⁹ *Pompano Beach*, 774 F.2d at 1541.

⁶⁰ *Id.*

⁶¹ Three cases indicate that the advisory circular is a significant statement of FAA policy. *See, e.g., Alphin*, 392 F. Supp. at 832 ("FAA has issued policy statements and advisory circulars from time to time. The seven page Advisory Circular dated 4 April 72 contained the following . . ."); *Niswonger*, 411 F. Supp. at 767 ("Advisory Circular no. 150/5190-2A of April 4, 1972 from the Department of Transportation, Federal Aviation Administration provides insight into that agency's interpretation of the prohibition of exclusive rights at airports.").

⁶² *See generally supra* note 61.

⁶³ *Alphin*, 392 F. Supp. at 832. This definition of "exclusive right" is taken verbatim from the Attorney General's opinion given to the Secretary of Commerce in 1941 and interpreting section 303 of the CAB Act. 40 Op. Att'y Gen. 72 (1941). *See supra* notes 39-44 for a discussion of the 1941 Attorney General's opinion.

⁶⁴ *Alphin*, 392 F. Supp. at 832. The circular states:

An exclusive right may be conferred either by express agreement, by imposition of unreasonable standards or requirements, or by any other means. Such a right conferred on one or more parties but excluding others from enjoying or exercising a similar right or rights would be an exclusive right.

7. POLICY. The grant of an exclusive right for the conduct of any aeronautical activity, on an airport on which Federal funds have been expended, is regarded as contrary to the requirement of applicable laws, whether such exclusive right results from an express agreement, from the imposition of unreasonable standards or requirements, or by any other means The application of any unreasonable requirement, or standard not relevant to the proposed activity, or any requirement that is applied in a discriminatory manner shall

"exclusive right" an extremely broad definition. Before issuance of the circular it is doubtful that anything but *express* grants of exclusive right could violate section 1349(a).⁶⁵ Finally, the circular stresses that the presence at an airport of only one enterprise conducting aeronautical activities is not conclusive evidence of the grant of an exclusive right.⁶⁶ The mere absence of competing activity is not in itself a violation of section 1349(a) if the airport authorities did not intend, or take positive action, to ex-

be considered a constructive grant of an exclusive right contrary to applicable law and provisions of agency policy.

Id. at 832-33 (emphasis added). The 1972 Advisory Circular marked the first time section 1349(a) was interpreted such that it would be violated in the *absence* of an *express* grant of exclusive right. The 1941 Attorney General's opinion focused solely on whether "exclusive right" meant merely the right to exclusively use an airport for all aeronautical purposes. *See supra* notes 39-44 for a discussion of the Attorney General's opinion. Although the Attorney General gave a broad interpretation to section 1349(a), finding that an exclusive right to operate or use a particular aeronautical activity constitutes an "exclusive right" within the meaning of the statute, there was no question that the grants at issue had been *express*. *See, e.g.*, 40 Op. Att'y Gen., *supra* note 41, at 72. ("The Acting Secretary states that . . . some airports which he desires to develop in his current program have 'out-standing contracts and leases granting exclusive rights' . . .").

The importance of the FAA's expansion of the legal meaning of "exclusive right" cannot be over emphasized. To date, only two cases have found *implied* grants of exclusive rights resulting from discriminatory conduct and/or the imposition of unreasonable standards. Those cases are *Southwest Airlines*, *see infra* notes 93-132, and *Pompano Beach*, *see supra* notes 11-29; *see also infra* notes 144-216. Both cases, and *Pompano Beach* in particular, could provide the impetus for an even broader expansion of section 1349(a). *See infra* notes 182-216 for a discussion of the practical implications of the *Pompano Beach* decision.

⁶⁵ *See supra* note 64 for a discussion of the circular's broad interpretation of "exclusive right."

⁶⁶ *Alphin*, 392 F. Supp. at 832. The relevant section of the circular states:

A. *Single Activity*. The presence on an airport of only one enterprise conducting aeronautical activities does not necessarily mean that an exclusive right has been granted. If there is no intent by express agreement, by the imposition of unreasonable standards, or by any other means to exclude others, the absence of a competing activity is not a violation of this policy. This sort of situation frequently arises where the market potential is insufficient to attract additional aeronautical activities. So long as the opportunity to engage in an aeronautical activity is available to those who meet reasonable and relevant standards, the fact that only one enterprise takes advantage of the opportunity does not constitute a grant of an exclusive right.

Id.

clude others.⁶⁷ Apart from the legal ramifications of violating section 1349(a), the FAA felt that adherence to section 1349(a) enhances the usefulness of an airport and allows the public to enjoy the benefits of competitive enterprise.⁶⁸

Overall, the legislative and administrative background of section 1349(a) suggests that the term "exclusive right" was intended to be broadly construed.⁶⁹ To avoid violation of section 1349(a), each aeronautical activity at a federally funded airport must be open to widespread competition.⁷⁰ The FAA has indicated that the "grant" of an exclusive right need not be express in order to consti-

⁶⁷ *Id.* at 833. The circular states:

b. *Space Limitations.* The leasing of all available airport land or facilities suitable for aeronautical activities to a single enterprise will be construed as evidence of an intent to exclude others. *This presumption will not apply if it can be reasonably demonstrated that the total space leased is presently required and will be immediately used to conduct the planned activity.* The amount of space leased to a single enterprise should be limited to that for which it can clearly demonstrate an actual, existing need. If additional space becomes necessary at a later date, it must be made available, not only to an incumbent enterprise, but at the same time to all qualified proponents or bidders. *The advance grant of options or preferences on future sites to a single incumbent is evidence of an intent to grant an exclusive right.* On the other hand, nothing in this policy should be construed as limiting the expansion of a single enterprise when it needs additional space, even though it may ultimately reach complete occupancy of all space available.

Id. (emphasis added).

⁶⁸ *Id.* at 832. The exact language states:

The agency considers that the existence of an exclusive right to conduct any aeronautical activity limits the usefulness of an airport and deprives the using public of the benefits of competitive enterprise. Apart from legal considerations, the agency believes it clearly inappropriate to apply Federal funds to improvement of an airport where full realization of the benefits would be restricted by the exercise of an exclusive right to engage in aeronautical activities.

Id.

⁶⁹ Since the FAA published its 1972 Advisory Circular, *see supra* notes 58-68, the legal interpretation of section 1349(a) has been expanded to proscribe not only *express* grants of exclusive right to operate at federally funded airports, but *implied* grants as well. The implied grant arises from the imposition of unreasonable standards or requirements or by *any other means*. *See supra* note 64 for a discussion of implied grants.

⁷⁰ *See generally* 40 Op. Att'y Gen. 71, *supra* notes 39-44 for pronouncements supporting this proposition; *supra* notes 51-57 for discussion of the language of section 18 of the Development Act (currently codified as amended at 49 U.S.C. app.

tute a violation of section 1349(a).⁷¹ The imposition of unreasonable standards or any other discriminatory action toward a given lessee could be sufficient.⁷²

B. Case Law Interpretation of Section 1349(a)

1. No Private Cause of Action under Section 1349(a)

As stated above, the administrative history of section 1349(a) suggests that it was intended to be broadly construed.⁷³ Even so, it has not been interpreted to provide a private cause of action,⁷⁴ and its usefulness to potential plaintiffs is, therefore, limited.⁷⁵ Although at least three courts have applied section 1349(a)'s "exclusive right" prohibition in private actions, only one explicitly addressed the issue.⁷⁶ Further, all three antedated *Cort v.*

§ 2210 (1982)); *supra* notes 58-68 for a discussion of the FAA's 1972 Advisory Circular.

⁷¹ See *supra* notes 64-65 and accompanying text for a discussion of how the FAA's 1972 Advisory Circular broadened the interpretation of "exclusive right."

⁷² *Id.*

⁷³ See *supra* note 69 and accompanying text. In *Aircraft Owners & Pilots Ass'n v. Port Auth.*, 305 F. Supp. 93, 105 (E.D.N.Y. 1969), District Judge Dooling stated that the legislative history of section 1349(a) suggests that it was to be "narrowly construed" — that the type of exclusive right forbidden was "one of the sort noxious to the anti-trust laws." *Id.* It should be noted, however, that not only did Judge Dooling find section 1349(a) applicable in a fact situation far removed from the type involved in antitrust actions, see *infra* notes 82-92 for a discussion of the facts of *Aircraft Owners*, but he also wrote his opinion three years before the FAA published its expansive definition of "exclusive right." See *supra* notes 58-68 for a discussion of the 1972 advisory circular.

⁷⁴ See, e.g., *Guthrie v. Genesee County*, 494 F. Supp. 950, 960 (W.D.N.Y. 1980) ("[N]o private remedy exists under 49 U.S.C. § 1349(a) and . . . defendants' motion to dismiss plaintiffs' claim under that section should be granted."); *Hill Aircraft & Leasing Corp. v. Fulton County*, 561 F. Supp. 667, 673-74 (N.D. Ga. 1982) ("The case against implication of a private cause of action under 49 U.S.C. § 1349 is . . . strong The court . . . holds that no individual right of action under this statute may be implied in this case.").

⁷⁵ Its usefulness is limited because without a private cause of action, all a potential plaintiff can do is file a complaint with the FAA.

⁷⁶ The three cases in which private plaintiffs were allowed to pursue causes of action based on section 1349(a) are *Aircraft Owners & Pilots Ass'n v. Port Auth.*, 305 F. Supp. 93 (E.D.N.Y. 1969), see *infra* notes 82-92 for a discussion of *Aircraft Owners*; *Continental Bus System, Inc. v. City of Dallas*, 386 F. Supp. 359 (N.D. Tex. 1974); and *Niswonger v. American Aviation, Inc.*, 411 F. Supp. 769 (E.D. Tenn. 1975), *aff'd*, 529 F.2d 526 (6th Cir. 1976), see *infra* notes 133-143 for a discussion of *Niswonger*. *Niswonger* was the only one of the three that explicitly ad-

Ash,⁷⁷ a 1978 Supreme Court decision establishing a four-prong "implied" cause of action test. Since the *Cort* decision, three additional cases have applied the *Cort* factors to section 1349(a),⁷⁸ and all three have expressly determined that Congress did not intend for section 1349(a) to confer a private cause of action.⁷⁹

2. Judicial Interpretation of "Exclusive Right"

Since private antitrust actions have been pursued against defendants engaging in the type of activity prohibited by section 1349(a),⁸⁰ the grant of "exclusive right"

addressed whether a private cause of action could be implied under section 1349(a). In deciding that it could, the court stated:

American also contends that the allegations herein fall within the primary jurisdiction of the Federal Aviation Administration (FAA), and that the plaintiff must first exhaust the administrative remedies afforded . . . "[I]t is clear that a violation of the provisions of the Federal Aviation Act or the regulations or rules issued pursuant thereto may give rise to a private federal right of action maintainable by those injured by the violation. Judge Frank, speaking for the court in *Fitzgerald*, specifically rejected the argument raised by (the defendants) that 'the sole non-criminal federal remedy for a violation of any provisions of the Act is to be found in . . . a complaint to the Civil Aeronautics Board (or administrator) which must investigate the complaint and, if the facts warrant, must issue an order compelling compliance with the violated provisions of the Act.' Judge Frank stated: 'We cannot agree. As such an order must look to the future, obviously it cannot afford redress to one harmed by a violation (of a section of the Act). . . . Plaintiffs cannot be relegated to administrative remedies when these remedies do not exist'

Niswonger, 411 F. Supp. at 768 (quoting *Town of East Haven v. Eastern Airlines, Inc.*, 282 F. Supp. 507 (D.C. Conn. 1968) (citation omitted)).

⁷⁷ 422 U.S. 66 (1975). Under *Cort*, the following factors are analyzed in order to determine whether a private cause of action should be implied in a statute: (1) whether the statute was enacted for the particular benefit of a class to which Plaintiff belongs, (2) whether or not the legislative history explicitly or implicitly creates or denies a private right of action, and (3) whether a private remedy is necessary to effectuate the purpose of the section. *Guthrie*, 494 F. Supp. at 959; *Hill Aircraft*, 561 F. Supp. at 672.

⁷⁸ The three post-*Cort* cases holding that no private cause of action can be implied from section 1349(a) are *Guthrie*, 494 F. Supp. at 950; *Hill Aircraft*, 561 F. Supp. at 667; and *Pumpkin Air, Inc. v. City of Addison*, 608 F. Supp. 787 (D.C. Tex. 1985).

⁷⁹ See generally *supra* note 78.

⁸⁰ For cases in which antitrust causes of action were pursued based on conduct similar to that involved in section 1349(a) cases, see *Pinehurst Airlines, Inc. v. Resort Air Serv., Inc.*, 476 F. Supp. 543 (M.D.N.C. 1979); *Alphin*, 392 F. Supp. at

forbidden by section 1349(a) was originally conceptualized as conduct "noxious to the antitrust laws."⁸¹ However, the District Court for the Eastern District of New York in *Aircraft Owners & Pilots Ass'n v. Port Auth.*,⁸² determined that section 1349(a) should not be "confined to instances of manifest antitrust violation" alone.⁸³

In *Aircraft Owners*, an association of general aviators sought to enjoin the imposition of "take-off" fees by the Port Authority of New York.⁸⁴ The Port Authority imposed the fee on aircraft operating with a seating capacity of less than twenty-five during certain peak traffic hours.⁸⁵ The Port Authority developed the fee in order to relieve congestion and to achieve maximum operating efficiency at three major airports.⁸⁶ Since section 1304 of the Federal Aviation Act declares a "public right of freedom of transit through the navigable airspace of the United States,"⁸⁷ the Aircraft Owners and Pilots Association believed the fee to be openly discriminatory.⁸⁸ Therefore, it claimed, the fee violated several provisions of federal law,

813; *National Aviation Trades Ass'n v. CAB*, 420 F.2d 209 (D.C. Cir. 1969); *E. W. Wiggins Airways, Inc. v. Massachusetts Port Auth.*, 362 F.2d 52 (1st Cir. 1966).

⁸¹ *Pompano Beach*, 774 F.2d at 1542 (quoting *Aircraft Owners & Pilots Ass'n v. Port Auth.*, 305 F. Supp. 93, 105 (E.D.N.Y. 1969)).

⁸² 305 F. Supp. 93 (E.D.N.Y. 1969).

⁸³ *Id.* at 105.

⁸⁴ *Id.* at 96. Although termed a "take-off" fee, the fee was exacted during prescribed periods from airplanes landing as well as airplanes "taking off." *Id.*

⁸⁵ *Id.* The fee also did not apply to helicopters or air taxis.

⁸⁶ *Id.* at 98. The airports are John F. Kennedy International Airport, LaGuardia Airport, and Newark Airport. *Id.* at 97. These three airports "accommodate substantially all of the area's commercial airline traffic." *Id.*

The Port Authority of New York was created by an interstate compact between New Jersey and New York. *Id.* at 96. Under the compact the Port Authority is authorized to maintain and operate all facilities "necessary, convenient or desirable for the landings, taking off, accommodation, and servicing of aircraft." and to determine "all details of financing, construction, leasing, charges, rates, tolls, contracts, and the operation of air terminals owned or controlled." *Id.*

⁸⁷ 49 U.S.C. app. § 1304 (1982); see also *Aircraft Owners*, 305 F. Supp. at 101 (interpreting section 1304 as the "most basic of all federal provisions").

⁸⁸ *Aircraft Owners*, 305 F. Supp. at 101. In making this argument, the association apparently contended that under federal law, each aircraft — whether it contained ten seats or two hundred — deserved equal access to runways at federally funded airports. However, as the court explicitly noted, "[i]f it be true that all persons have equal rights of access to the navigable air space, then it is not undifferenti-

including section 1349(a).⁸⁹ The court did not consider the dispute "so remote from the class of competitive restraints" envisioned by section 1349(a) that the statute would not apply.⁹⁰ Nevertheless, the court found that no exclusive right had been granted through the use of the fee.⁹¹ Preferential landing times and the imposition of fees during peak traffic hours were deemed to be acceptable ways to control safety and efficiency, and compatible with every person's interest in freedom of access to navigable airways.⁹²

Decided four years after *Aircraft Owners, City of Dallas v. Southwest Airlines Co.*⁹³ marked the first time a court held an airport policy to be unjustly discriminatory and tantamount to the grant of an exclusive right.⁹⁴ *Southwest Airlines*, a case decided by the District Court for the Northern District of Texas and affirmed by the Fifth Circuit Court of Appeals,⁹⁵ relied heavily on the Attorney General's 1941 interpretation of section 303⁹⁶ and the *Aircraft Own-*

ated aircraft by *count* that must be treated equally in landing approach and take-off." *Id.* at 106 (emphasis added).

⁸⁹ *Id.* at 101. See *supra* note 29 for the relevant text of section 1349(a). The association cited two other federal statutes in addition to section 1349(a): 49 U.S.C. § 1304, see *supra* text accompanying note 87 for the relevant text of section 1304, and 49 U.S.C. § 1110 (1982) (providing that as a condition precedent to approval of an airport project, the (FAA) Administrator "shall receive assurances . . . that . . . the airport to which the project relates will be available for public use on fair and reasonable terms and without unjust discrimination . . .").

⁹⁰ *Aircraft Owners*, 305 F. Supp. at 105.

⁹¹ See *id.* at 105-09.

⁹² *Id.* at 106. "Considerations of safety and of efficient utilization of the air space are both valid grounds upon which to establish preferential assignments of landing and take-off times . . ." *Id.*

⁹³ 371 F. Supp. 1015 (N.D. Tex. 1973), *aff'd*, 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079 (1974). See *infra* text accompanying notes 158-160 for the Eleventh Circuit's interpretation and application of *Southwest Airlines in Pompano Beach*.

⁹⁴ *Southwest Airlines*, 371 F. Supp. at 1032; *cf. supra* text accompanying notes 82-93 and the discussion of *Aircraft Owners*, a prior case finding no exclusive right to have been granted.

⁹⁵ *City of Dallas v. Southwest Airlines Co.*, 494 F.2d 773 (5th Cir. 1974).

⁹⁶ 40 Op. Att'y Gen. 71 (1941), see *supra* text accompanying notes 39-44 for a discussion of the Attorney General's interpretation of section 1349(a)'s "exclusive right."

ers⁹⁷ case in reaching its decision.⁹⁸

In *Southwest Airlines*, the cities of Dallas and Fort Worth had been in the process of relocating all interstate air service⁹⁹ to their new Regional Airport.¹⁰⁰ The cities were concerned that competitive activity at each existing municipal airport could jeopardize their ability to operate the new Regional Airport and retire its debt.¹⁰¹ As a result, the cities issued a joint ordinance limiting the type of air activity that could continue at the municipal airports.¹⁰² Southwest Airlines, which had been conducting a wholly intrastate commuter airline service out of Love Field in Dallas, was excluded by the ordinance.¹⁰³ Because of the restrictive terms of the ordinance, Southwest Airlines was the only intrastate airline service which could not remain at Love Field.¹⁰⁴ The large commercial interstate airlines

⁹⁷ 305 F. Supp. 93 (E.D.N.Y. 1969); see *supra* text accompanying notes 82-92 for a discussion of *Aircraft Owners*.

⁹⁸ *Southwest Airlines*, 371 F. Supp. at 1030. The court distinguished the holding in *Aircraft Owners* (which the court called *Port Authority*) on the grounds that the Dallas/Fort Worth region would not foreseeably suffer the "severe shortage of Airport capacity" which justified the preferences granted in *Aircraft Owners*. *Id.*

⁹⁹ In 1964, the Civil Aeronautics Board (CAB) entered an interim order giving Dallas and Fort Worth 180 days in which to designate a single airport through which all CAB-regulated carriers would serve the area. *Southwest Airlines*, 371 F. Supp. at 1020. Instead of designating Love Field, in Dallas, or Greater Southwest International Airport, in Fort Worth, the cities agreed to construct and operate a new regional airport to be located mid-way between the two. *Id.* Thus, the relocation of all interstate air service to the regional airport was instigated by the CAB. *Id.*

¹⁰⁰ *Id.* at 1019.

¹⁰¹ *Id.* at 1020.

¹⁰² *Id.* The ordinance, titled the 1968 Regional Airport Concurrent Bond Ordinance, authorized the issuance of revenue bonds and provided, among other things, that the cities "shall take such steps as may be necessary, appropriate and legally permissible . . . to provide for the orderly, efficient and effective phase-out . . . of any and all Certificated Air Carrier Services, and to transfer such activities to the Regional Airport . . ." *Id.*

¹⁰³ *Id.* at 1021. Southwest was never officially ordered to move from Love Field *per se*, but the cities did reject a "Petition for Exemption" submitted by Southwest, contending that CAB rulings deprived them of jurisdiction to consider the request. *Id.* The cities then filed this lawsuit seeking a declaration of their right to exclude Southwest from Love Field. *Id.* at 1019; see *infra* text accompanying notes 107-132 for a discussion of the court's decision in *Southwest Airlines*.

¹⁰⁴ By the terms of the ordinance, "air taxis," unscheduled cargo flights, general aviation (i.e., private and corporate aircraft), and unscheduled charter flights

were allowed to continue their intrastate commuter services, all charter flights could stay, and Southwest's major competitors, small "air taxi" lines,¹⁰⁵ were exempt from the move as well.¹⁰⁶

When Southwest petitioned Dallas and Fort Worth for an exemption from the ordinance, the cities sought a declaration that they had the right under federal and state law to exclude Southwest from Love Field once the Regional Airport opened.¹⁰⁷ The court held that the cities had unjustly discriminated against Southwest and had thereby granted an exclusive right to the carriers allowed to remain at Love Field.¹⁰⁸

The district court gave four reasons for its decision.

were exempted from the move to the regional airport. The intrastate commuter services provided by the interstate, CAB-authorized air carriers were exempted as well. As a result, Southwest was the only intrastate air carrier affected by the ordinance. *Southwest Airlines*, 371 F. Supp. at 1027.

¹⁰⁵ Although the term "air taxi" was never defined by the district court in its opinion, the district court noted that "air taxi" operators carry passengers for hire on a scheduled basis, are certified for intrastate travel by the Texas Aeronautics Commission (TAC), and are competitors of Southwest Airlines. *Id.* See *infra* note 111 for a description of the TAC's regulatory power.

¹⁰⁶ *Southwest Airlines*, 371 F. Supp. at 1027-28.

¹⁰⁷ *Id.* at 1019. In 1964, the CAB entered an interim order directing Dallas and Fort Worth to designate one specific airport through which all interstate air carrier service to the area would be provided. It indicated that if the cities could not agree which airport to so designate, the CAB would "amend the certificates of the interstate air carriers under its jurisdiction so as to cause them to serve either Love Field or Fort Worth's (Greater Southwest International Airport)." *Id.* at 1019-20 (emphasis added). In their complaint, the cities argued that they were required by the CAB's order to move not only all interstate air service to the new regional airport, but Southwest's wholly intrastate service as well. *Id.* at 1021. A novel theory it advanced to support this argument was that since Love Field and the regional airport had both received Federal funding, the cities were required to exclude Southwest from Love Field in order to avoid unjustly discriminating against the CAB carriers in violation of section 1349(a). *Id.* at 1023. The court rejected this argument with the following language:

The federal prohibition against unjust discrimination is designed to ensure that the airport owner or operator . . . provides potential users of the airport with a fair and nondiscriminatory "opportunity" to use its facilities, provided the user can lawfully do so. If the potential user cannot, or does not, choose to avail itself of the "opportunity" to use the airport, the airport operator is obviously not required to exclude those who can and do choose to use such facilities.

Id.

¹⁰⁸ *Id.* at 1030.

First, it noted that the cities could not claim, as had the Port Authority of New York in *Aircraft Owners*,¹⁰⁹ that its preferential treatment of certain air carriers was in the public interest.¹¹⁰ The Texas Aeronautics Commission (TAC), the state agency charged with the economic regulation of Texas intrastate air carriers,¹¹¹ had issued Southwest a Certificate of Public Convenience and Necessity when Southwest first began operating out of Love Field.¹¹² The Certificate authorized Southwest to serve the Dallas-Fort Worth region through any airport in the area.¹¹³ Southwest, therefore, had the right to operate out of Love Field and remain there if it chose. Although the cities had obtained permission from the CAB to limit CAB-authorized interstate air carriers to the Regional Airport, they had not sought similar permission from the TAC for TAC-authorized intrastate air carriers.¹¹⁴ The court concluded that "TAC's existing determination that the public interest requires Southwest to serve Love Field must . . . be deemed conclusive" ¹¹⁵

¹⁰⁹ 305 F. Supp. at 93; see *supra* text accompanying notes 82-92 for a discussion of *Aircraft Owners*.

¹¹⁰ *Southwest Airlines*, 371 F. Supp. at 1030-31; see also *Aircraft Owners*, 305 F. Supp. at 105-09 for a general discussion of the public interests supporting the discriminatory landing fees addressed in that case.

¹¹¹ *Southwest Airlines*, 371 F. Supp. at 1019. Although the federal government has preempted much of the field of civil air regulation, states still have the power to act so long as there is no conflict with federal law. *Texas Aeronautics Comm'n v. Braniff Airways Inc.*, 454 S.W.2d 199 (Tex.), *cert. denied*, 400 U.S. 943 (1970). Title 3A of the Revised Civil Statutes of the State of Texas establishes and governs the Texas Aeronautics Commission (TAC). Article 46c-6(3) states:

Air Carriers. (a) The Commission is hereby granted and vested with the right, power and authority to promulgate and administer economic rules and regulations over air carriers . . . to the extent that its rules and regulations do not conflict with federal rules and legislation concerning functions within the jurisdiction of federal agencies.

TEX. REV. CIV. STAT. ANN. art. 46c-6(3) (Vernon 1969)(emphasis added). Note that Article 46c-6(3) does not distinguish between interstate and intrastate air service, and the only limitation on the type of air service to which the TAC's regulatory power extends is contained in the last sentence highlighted above.

¹¹² *Southwest Airlines*, 371 F. Supp. at 1021.

¹¹³ *Id.*

¹¹⁴ *Id.* at 1030-31.

¹¹⁵ *Id.* at 1031. In reaching this determination, the court stressed that since the TAC was charged by statute to determine "the public convenience and necessity

Second, relying again on *Aircraft Owners*¹¹⁶ as authority,¹¹⁷ the court stated that the recognized preference for commercial air traffic must prevail over the cities' unstated, yet obvious, desire to exclude Southwest for purely economic reasons.¹¹⁸ Whereas in *Aircraft Owners* mass public transportation was acceptably granted preference over general aviation, Dallas and Fort Worth were doing just the opposite.¹¹⁹ The cities were granting access to private aircraft, corporate jets, and unscheduled cargo flights while attempting to exclude the public air service offered by Southwest.¹²⁰ Instead of maximizing public access to a public airport supported by federal funds, the cities were, according to the court, overtly sup-

in the area of intrastate air transportation" and it had issued Southwest a certificate of public convenience and necessity, and since Dallas and Fort Worth had not directly challenged the TAC's judgment in issuing the certificate, the TAC's decision that Southwest should serve Love Field would not be subject to collateral attack. *Id.* at 1030-31.

¹¹⁶ See *supra* text accompanying notes 82-92 for a discussion of *Aircraft Owners*.

¹¹⁷ The district court relied heavily upon *Aircraft Owners* as a statement of public policy and as a legal framework for its conclusions in *Southwest Airlines*. See *Southwest Airlines*, 371 F. Supp. at 1028-30.

¹¹⁸ *Southwest Airlines*, 371 F. Supp. at 1031. If Southwest remained at Love Field, the cities were concerned that the resulting decrease in the revenue generated by the Regional Airport would frustrate their efforts to retire the Regional Airport's debt. *Id.* at 1025. With respect to this issue the court stated:

Finally, Plaintiffs' apparently contend that if Southwest Airlines is permitted to remain at Love Field after the opening of the Regional Airport, the ability of the Regional Airport Board to operate that Airport and to retire the outstanding debt on the Airport Revenue Bonds will be jeopardized due to diversion of needed revenue to Love Field. It is not seriously argued by Plaintiffs that the revenues from Southwest Airlines' three present aircraft and the passengers they carry are, in and of themselves, essential to the operation of the Regional Airport. Instead, Plaintiffs maintain that Southwest's continued presence at Love Field will, to some extent, induce the CAB carriers to retain service there (an argument that Southwest has characterized as the "domino theory") and that the cumulative loss of revenue from Southwest and these other carriers will have a significant impact on the financial security of the Regional Airport.

In the opinion of the Court, the evidence demonstrates that Plaintiffs have overstated their fears concerning the financial impact upon the Regional Airport of Southwest's remaining at Love Field . . .

Id.

¹¹⁹ *Id.* at 1029; see also *Aircraft Owners*, 305 F. Supp. at 107.

¹²⁰ *Southwest Airlines*, 371 F. Supp. at 1029.

pressing competition in order to gain an economic advantage for the Regional Airport.¹²¹ The court found that this action contradicted the policies underlying section 1349(a).¹²²

In formulating the third reason why the cities were in violation of federal law, the court focused on the discriminatory effect the ordinance's classification system would have on the public.¹²³ As stated above, Dallas and Fort Worth allowed air taxis, as well as other air carriers in direct competition with Southwest, to continue their operations at Love Field.¹²⁴ Southwest's presence in the short-haul market had generated vigorous competition, resulting in greatly expanded commuter markets and substantial savings to the traveling public.¹²⁵ If the ordinance had been allowed to operate and Southwest had been forced to move to the Regional Airport, this positive effect on market competition would have deteriorated. Consequently, the court deemed the ordinance discriminatory *per se*¹²⁶ based on the anti-competitive effect it had on the

¹²¹ *Id.* at 1029-30; see *supra* note 118 and accompanying text for background information on the economic advantages the cities sought to gain by excluding Southwest from Love Field.

¹²² *Southwest Airlines*, 371 F. Supp. at 1030. For a discussion of section 1349(a), its history, and the policies behind it, see *supra* notes 29-72 and accompanying text.

¹²³ *Southwest Airlines*, 371 F. Supp. at 1031.

¹²⁴ See *supra* note 104 and accompanying text for a discussion of the type of air traffic exempted from the ordinance.

¹²⁵ *Southwest Airlines*, 371 F. Supp. at 1031 n.8. In a footnote the court stated: The uncontroverted evidence shows that Southwest's presence in the short-haul market, and particularly at close-in Hobby Airport in Houston has generated vigorous competition among the various carriers on the routes which Southwest serves resulting in a greatly expanded short-haul commuter market and in very substantial savings to the traveling public.

Id.

¹²⁶ *Id.* at 1031. The fact that the court deemed the conduct of Dallas and Fort Worth (i.e., the promulgation of the 1968 Ordinance) discriminatory *per se* is significant. This is a major distinction between *Southwest Airlines* and *Pompano Beach*, see *infra* text accompanying notes 144-181. Although *Southwest Airlines* was cited as precedent for the holding of *Pompano Beach*, the city's conduct in *Pompano Beach* was not found to be discriminatory *per se*. See *infra* text accompanying notes 204-211 for a discussion of this distinction.

airlines and the public they serve.¹²⁷

Finally, the court found the exclusion of Southwest from Love Field to be "inherently unjust" because it attempted to remove the one type of passenger service most needed at a close-in airport.¹²⁸ The court emphasized that removal to an inconvenient airport would most likely discourage short-haul passengers from using the airways, and that buses, cars, and trains would become more viable alternatives.¹²⁹

To summarize, the court in *Southwest Airlines* interpreted *Aircraft Owners* as standing for two propositions: (1) a definite preference exists for mass transportation over private aircraft,¹³⁰ and (2) the reasonable limitation of a particular airport use is permissible, whereas the complete exclusion of that use bears a heavy burden of justification.¹³¹ The court relied upon both propositions extensively in order to reach its decision in *Southwest Airlines*.¹³²

One year after *Southwest Airlines* was decided, the District Court for the Eastern District of Tennessee declared in *Niswonger v. American Aviation, Inc.*¹³³ that a county's leasing of all of its available airport land or facilities suitable for aeronautical activities to a single enterprise was evidence of the county's intent to exclude others.¹³⁴ The court reasoned further that in order for airports to comply with section 1349(a), they must limit the amount of

¹²⁷ *Southwest Airlines*, 371 F. Supp. at 1031.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1031-32.

¹³⁰ *Id.* at 1028-30 (construing *Aircraft Owners*, 305 F. Supp. at 106-08).

¹³¹ *Id.* at 1029.

¹³² *Id.* at 1030-32.

¹³³ 411 F. Supp. 769 (E.D. Tenn. 1975), *aff'd*, 529 F.2d 526 (6th Cir. 1976).

¹³⁴ *Id.* at 770-71. In its memorandum decision the court made ten findings of fact. One finding stated "[b]y the aforementioned lease indenture of June 16, 1969, the (Tennessee Airport Authority) leased to (American Aviation, Inc.) exclusively all the then available facilities suitable for aeronautical activities and evinced thereby an intention to exclude therefrom all other general fixed-base operators." *Id.* at 770 (emphasis added). Later in the opinion, the court quoted the following language from the 1972 FAA Advisory Circular: "[T]he leasing of all available airport land or facilities suitable for aeronautical activities to a single enterprise . . . [is] . . . evidence of an intent to exclude others." *Id.* For a discussion of the 1972 FAA Advisory Circular, see *supra* notes 58-68 and accompanying text.

space leased to any single enterprise to an amount for which the enterprise can demonstrate an actual, existing need.¹³⁵

In *Niswonger*, defendant American Aviation's lease with the Greeneville-Greene County Airport Authority granted it the exclusive right to use all ramp and hangar space available at the Greeneville municipal airport.¹³⁶ Plaintiff Niswonger, doing business as Greeneville Air Service, operated at the airport as a licensed air taxi commercial operator.¹³⁷ Greeneville Air Service applied to the Airport Authority to become a general fixed-base operator, but was denied access because the county had leased all ramp space then existing at the airport to American Aviation.¹³⁸ Niswonger filed suit, seeking a declaration that the lease between the Airport Authority and American Aviation was void because it illegally granted an exclusive right.¹³⁹

American Aviation contended that section 1349(a) applied only to actual runways and other areas used in com-

¹³⁵ *Niswonger*, 411 F. Supp. at 771. For example, two findings of fact stated:

8. There is available at the airport space for an additional qualified general fixed-base operator, and *American has been granted by the authority, Greeneville, and the county more area at such airport than American can actually use reasonably in its existing operations.*

9. Air Service applied to the authority in September, 1973, to become an additional general fixed-base operator at the airport. The authority did not consider such application, because *all the ramp space then existing was leased to American.*

Id. at 770 (emphasis added)(footnotes omitted).

¹³⁶ *Id.* at 770.

¹³⁷ *Id.* at 769-70.

¹³⁸ *Id.* at 770.

¹³⁹ *Id.* at 769-70. Although Niswonger filed suit seeking a declaratory judgment, he did not invoke the court's jurisdiction under the Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202 (1982). *Id.* at 765. Instead, he sought to invoke the court's jurisdiction under 28 U.S.C. § 1337 ("[T]he district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.") *Id.* at 764. The defendants moved the court to dismiss Niswonger's action for lack of subject matter jurisdiction. *Id.* Even though it has been held that section 1349(a) does not provide a private cause of action the court held that Niswonger *did* state a cause of action under section 1349(a) for the purpose of surviving a motion to dismiss. *Niswonger*, 411 F. Supp. at 767. The court's rationale is discussed at *supra* note 76.

mon by air carriers.¹⁴⁰ The court, however, relying on the 1941 Attorney General's Opinion,¹⁴¹ and the FAA's 1972 advisory circular,¹⁴² reiterated that section 1349(a) proscribes the grant of an exclusive right for any particular aeronautical activity and it therefore declared the lease void.¹⁴³

II. CITY OF POMPANO BEACH v. FAA

A. Eleventh Circuit's Interpretation of Section 1349(a)

In *City of Pompano Beach v. FAA*,¹⁴⁴ the court began its discussion of section 1349(a) by recognizing that the FAA is responsible for ensuring compliance with the Federal Aviation Act,¹⁴⁵ and consequently, section 1349(a) is a statute "committed to the FAA for its administration."¹⁴⁶ Since section 1349(a) provides that "[t]here shall be no exclusive right for the use of any landing area or air navigation facility upon which federal funds have been expended,"¹⁴⁷ and the city of Pompano Beach had been the recipient of federal funds,¹⁴⁸ the court held that the city was governed by the Act's "exclusive right"

¹⁴⁰ *Niswonger v. American Aviation, Inc.*, 411 F. Supp. 763, 765 (E.D. Tenn. 1975) (decision on motion to dismiss).

¹⁴¹ See *supra* text accompanying notes 40-44 for a discussion of the 1941 Attorney General's opinion.

¹⁴² See *supra* notes 58-68 and accompanying text for a discussion of the 1972 Advisory Circular.

¹⁴³ *Niswonger*, 411 F. Supp. at 771. Although the memorandum opinion does not explicitly state that the court relied on the Attorney General's 1941 opinion and the FAA 1972 Advisory Circular, the relevant language from both is quoted in the opinion. See *id.* at 770-71; *Niswonger*, 411 F. Supp. at 766-67 (decision on motion to dismiss).

¹⁴⁴ 774 F.2d 1529 (11th Cir. 1985). See *supra* notes 1-28 and accompanying text for a discussion of the facts of *Pompano Beach*.

¹⁴⁵ *Pompano Beach*, 774 F.2d at 1541. See *supra* notes 45-48 and accompanying text for a brief discussion of the Federal Aviation Act.

¹⁴⁶ *Pompano Beach*, 774 F.2d at 1541.

¹⁴⁷ *Id.* (quoting 49 U.S.C. app. § 1349(a)(1982)). See *supra* note 29 for the complete text of section 1349(a). See *supra* notes 29-48 for the complete legislative history of section 1349(a). See *supra* notes 58-68 for the Federal Aviation Administration's interpretation of section 1349(a).

¹⁴⁸ *Pompano Beach*, 774 F.2d at 1541. The court stated that "the City of Pompano Beach has been the recipient of federal funds and property for its Air Park through various federal aid programs . . ." *Id.*

prohibition.¹⁴⁹

In reviewing the history of section 1349(a), the court quoted at length from the 1941 Attorney General's Opinion¹⁵⁰ that defined exclusive right as a "power, privilege, or other right excluding or debarring another or others from enjoying or exercising a like power, privilege, or right."¹⁵¹ It further noted that section 1349(a)'s goal is to prohibit monopolies and combinations in restraint of trade and to promote competition,¹⁵² and the court noted that, according to the Attorney General's opinion, *any* right to use a landing area or airport which is exclusive in character is prohibited.¹⁵³

Although the city of Pompano Beach never expressly granted the incumbent lessees John and Brian Becker an exclusive right,¹⁵⁴ the court emphasized that a city's "imposition of unreasonable standards or requirements" alone could cause a federally funded airport to invoke a section 1349(a) sanction.¹⁵⁵ In a footnote, the court

¹⁴⁹ *Id.* Specifically, the court found the city to be "subject to federal prohibitions against *unjust discrimination* resulting from the grant of an exclusive right." *Id.* (emphasis added). The court used the terms "unjust discrimination" and "exclusive right" throughout its opinion, but only the term "exclusive right" is used explicitly in section 1349(a). See *supra* note 29 for the text of section 1349(a).

¹⁵⁰ See *supra* text accompanying notes 40-44 for a discussion of the 1941 Attorney General's opinion.

¹⁵¹ *Pompano Beach*, 774 F.2d at 1541; 40 Op. Att'y Gen. at 72. See *supra* text accompanying notes 40-44 for a general discussion of the 1941 Attorney General's opinion. See *supra* note 43 for the text of the opinion containing the above quoted language.

¹⁵² *Pompano Beach*, 774 F.2d at 1541; see *supra* note 44 and accompanying text for a discussion of this goal in the 1941 Attorney General's opinion.

¹⁵³ *Pompano Beach*, 774 F.2d at 1541; see *supra* text accompanying notes 40-44 for a general discussion of the 1941 Attorney General's opinion. See *supra* note 42 for the text of the opinion referring to an "exclusive right" as *any* right to use a landing area which is exclusive in character.

¹⁵⁴ See *Pompano Beach*, 774 F.2d at 1535. See *supra* note 10 for background information on the incumbent lessees, John and Brian Becker, and their operations at the Air Park.

¹⁵⁵ *Pompano Beach*, 774 F.2d at 1542. The Federal Aviation Administration (FAA) first declared that the imposition of unreasonable standards or requirements could invoke a section 1349(a) sanction in its 1972 Advisory Circular. See *supra* notes 58-68 for a general discussion of the advisory circular. See *supra* note 64 for a specific discussion of the imposition of unreasonable standards as a legal

quoted from the FAA's 1972 advisory circular:¹⁵⁶ "So long as the opportunity to engage in an aeronautical activity is available to those who meet *reasonable and relevant standards*, the fact that only one enterprise takes advantage of the opportunity does not constitute a grant of an exclusive right."¹⁵⁷

The Eleventh Circuit concluded its review of section 1349(a)'s rather skeletal history by mentioning two major "exclusive right" cases: *City of Dallas v. Southwest Airlines Co.*¹⁵⁸ and *Niswonger v. American Aviation, Inc.*¹⁵⁹ Though the court did no more than tersely summarize each, it effectively, but subtly, revealed how each case would contribute to the standard it would apply to the City of Pompano Beach. The court cited *Southwest Airlines* for the proposition that avoiding potentially detrimental effects on competition does not, in itself, constitute a sufficient justification for granting exclusive rights.¹⁶⁰ In reviewing *Niswonger*, the court concluded that an exclusive right exists if a lessee controls, to the exclusion of others, more airport property than it reasonably needs or can be ex-

prohibition. See *infra* notes 182-211 for the practical implications of the use of unreasonable standards as a legal prohibition.

¹⁵⁶ See *supra* text accompanying notes 58-68 for a discussion of the 1972 FAA Advisory Circular and its definition of section 1349(a)'s "exclusive right."

¹⁵⁷ *Pompano Beach*, 774 F.2d at 1542 n.13 (emphasis added). See *supra* notes 66-67 for a discussion of this language as used in 1972 Advisory Circular.

¹⁵⁸ See *supra* text accompanying notes 93-132 for a discussion of *Southwest Airlines*.

¹⁵⁹ See *supra* text accompanying notes 133-143 for a discussion of *Niswonger*.

¹⁶⁰ *Pompano Beach*, 774 F.2d at 1542. With regards to the holding in *Southwest Airlines*, the Eleventh Circuit stated:

In [*Southwest Airlines*], the district court concluded that a city ordinance governing the phase-out provisions of Love Field near Dallas that would have allowed continued service at Love Field by certain types of aircraft but would have required Southwest and other aircraft in Southwest's classification to move to the new Regional Airport constituted unjust discrimination and a grant of an exclusive right of access to some carriers and not to others. The city's explanation for prohibiting Southwest from continuing its operation at Love Field was that it wanted to avoid the potential competitive effect on the regional airport; *The district court said this was insufficient justification.*

Id. (emphasis added) (citation omitted).

pected to use.¹⁶¹ The court also noted that both *Niswonger* and the present case involved situations where applicants for fixed base operators' leases had been unreasonably denied airport access.¹⁶²

B. *Application of Section 1349(a) to the City of Pompano Beach*

The Eleventh Circuit Court of Appeals based its holding in *Pompano Beach* on three key facts: (1) the uniquely discriminatory effect of the city's "standard" lease provisions on Brettman's ability to compete as an FBO at the Air Park,¹⁶³ (2) the monopolistic position the incumbent fixed base operators, the Beckers, enjoyed at the Air Park,¹⁶⁴ and (3) the city's "ulterior motive" in rejecting Brettman's application, a desire to shield the Beckers' operations from the competition that Brettman's proposed facility would bring.¹⁶⁵

¹⁶¹ *Id.* With regards to *Niswonger*, the court stated:

In [*Niswonger*], a case closely analogous to the case at bar, the district court held that the public airport authority violated federal law by granting an exclusive right to an incumbent fixed base operator. In *Niswonger*, an applicant for a fixed base operator's lease at the airport was denied access to the airport on the grounds that all available land had been leased to the incumbent fixed base operators. The court said that this transaction constituted a violation of federal law, particularly because *the lessee, by this device, had acquired control and exclusive use of more area of the airport than it reasonably needed or could be expected to use in conducting its business.*

Id. (emphasis added) (citation omitted).

¹⁶² *Id.* See the highlighted language quoted at *supra* note 161.

¹⁶³ *Pompano Beach*, 774 F.2d at 1543. See *infra* notes 166-169 and accompanying text for a discussion of the uniquely discriminatory effect of the city's conduct towards Brettman. The city's "standard" lease — which differed in several respects from the leases entered into with the incumbent FBOs — is discussed at *supra* notes 3, 8, 19, and 23.

¹⁶⁴ *Pompano Beach*, 774 F.2d at 1544. Although there were two incumbent fixed-base operators at the Air Park when Brettman applied for a lease, the two entities are owned and operated by a father and son team, John and Brian Becker. See *supra* note 10 for a discussion of the Becker's operations at the Air Park. See *supra* note 2 for a discussion of the Becker's protests to the Air Park Advisory Board against approving Brettman's application. See *infra* notes 170-175 and accompanying text for a discussion of Becker's "monopoly" as an exclusive right.

¹⁶⁵ *Pompano Beach*, 774 F.2d at 1544. See *infra* notes 176-178 and accompanying text for a discussion of the court's finding that the city desired to shield the Beckers from competition.

The court noted first that the provisions of the lease offered Brettman were disadvantageous to him on their face.¹⁶⁶ Brettman had testified that he was an experienced aviator and businessman, and that he engaged in the business of developing aircraft hangar facilities at airports.¹⁶⁷ The FAA hearing officer had found that the provisions of the city's "standard" lease would impose undue hardship upon Brettman's proposed business operation at the Air Park and render it noncompetitive with the existing fixed base operators.¹⁶⁸ The Eleventh Circuit held that these findings, coupled with the finding that the city's delays in negotiating with Brettman benefited the incumbent lessees, could reasonably be construed to amount to an implied grant of an exclusive right in favor of the Beckers.¹⁶⁹

¹⁶⁶ *Pompano Beach*, 774 F.2d at 1543. The court stated:

The City argues that the different provisions in the proposed Brettman lease are not unjustly discriminatory *per se*. This is true. But, based upon the evidence in the record, the hearing officer was entitled to find that they were unjustly discriminatory. First, *the cited provisions in the lease offered to Brettman are, on their face, disadvantageous to Brettman.*

Id. (emphasis added).

¹⁶⁷ *Id.* The court noted that "Brettman had constructed hangars at airports in Venice, Daytona Beach, Orlando, and Merritt Island, Florida and was soon to commence such an operation in Jacksonville." *Id.* Based on Brettman's experience, the Eleventh Circuit concluded that it was "reasonable for the [FAA] hearing officer to accept Brettman's testimony that the cited lease provisions would impose an undue hardship upon his proposed business operation at Pompano Beach Air Park" *Id.*

¹⁶⁸ *Id.* In a footnote, the court made the following observations:

For instance, three of the provisions impose upon Brettman financial obligations which are absent from or less than those imposed by the leases between the City and the Beckers. The City would have Brettman make a minimum investment of \$500,000, in return for a thirty-year lease, compared to \$200,000 for Pompano Air Center and \$100,000 for Bec-Air. The City sought to require a \$5,000 deposit at the outset from Brettman, while none was required of either of the Beckers. Finally, the City proposed to require Brettman to pay approximately the same rental rate for unimproved land as it is requiring the Beckers to pay for improved land, including taxi-ways, ramps, and tie-down space which was conveyed to the City by the federal government.

Id. at 1543 n.14.

¹⁶⁹ *Id.* at 1544. The court stated:

Applying the substantial evidence test, we will not disturb the credibility choices the fact finder has made or reevaluate the weight of the

After emphasizing that the city had unjustly discriminated against Brettman, the court reviewed why it was reasonable for the FAA hearing officer to conclude that Pompano Air Center (owned by John Becker) and Bec-Air (owned by John Becker's son Brian) enjoyed a monopoly at the Air Park. Even though they seemed, at first glance, to be separate competitors,¹⁷⁰ the two businesses were essentially one enterprise. While Pompano Air was a fully developed FBO, Bec-Air, located next door, was "little more than a corporate shell."¹⁷¹ The two corporations had interlocking officers, the two owners being father and son, and the court stated that the senior Becker had created Bec-Air for tax purposes rather than have his existing business absorb the operation.¹⁷² The court found that the Beckers enjoyed, in combination with each other, the type of unacceptable monopoly Congress intended to prohibit by the passage of section 1349(a).¹⁷³ Further, in an obvious reference to *Niswonger*,¹⁷⁴ the court found that neither Bec-Air nor Pompano Air had fully developed their leaseholds. Rather, each had retained "extensive va-

evidence. The hearing officer, relying on his findings that the provisions in the lease proposed by the City to Brettman were unjustly discriminatory and that the City's delays in negotiating with Brettman benefited the incumbent lessees, concluded that the City's conduct had the effect of granting the Beckers an exclusive right at its Air Park. This is a reasonable application of the law.

Id. at 1543-44.

¹⁷⁰ *Id.* at 1543-44.

¹⁷¹ *Id.* at 1544. See *supra* notes 2 and 10 for more information about the Beckers' operations.

¹⁷² *Pompano Beach*, 774 F.2d at 1544. "The two operations have interlocking officers, with the father and son basically trading positions in the corporate structure of each operation. The senior Becker purchased Executive Aviation in 1982 and created Bec-Air for tax purposes rather than having his existing company absorb the operation. Then he installed his son as the senior officer of Bec-Air, creating the guise of a separate business." *Id.* (emphasis added).

¹⁷³ *Id.* "It was reasonable for the hearing officer to conclude that the Beckers' businesses, in combination with each other, comprised the type of unacceptable monopoly Congress intended to prohibit when it enacted section 1349(a)." *Id.* See *supra* notes 29-39 for a discussion of the congressional intent behind section 1349(a).

¹⁷⁴ See *supra* text accompanying notes 133-143 for a discussion of *Niswonger*.

cant areas."¹⁷⁵

Finally, the court of appeals was adamant that "the potential competitive effect of Brettman's operation upon the Beckers' business was an insufficient reason to deny access to Brettman."¹⁷⁶ It stressed that although there was no evidence that the city expressly agreed to give the Beckers an exclusive right, such a right can be created through the imposition of unreasonable standards or requirements on outsiders.¹⁷⁷ Therefore, instead of making its public airport available to the benefits of competition, the city, by imposing unreasonable standards and requirements, stripped from new competitors the opportunity to enjoy the rights and privileges held by the Beckers.¹⁷⁸

After discussing these three fact situations as its

¹⁷⁵ *Pompano Beach*, 774 F.2d at 1544. The court stated that "[n]either Bec-Air nor Pompano Air Center has fully developed all of the land leased from the City; extensive vacant areas remain on their leaseholds." *Id.* Brettman never contended that the Beckers had an exclusive right to all available space at the Air Park. In fact, whether or not the Beckers had fully developed their leaseholds or not is irrelevant *except* to the extent that it helped the court to liken its case to *Niswonger*.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* In an important section of the opinion the court wrote:

True, there was no evidence that the City by express agreement gave the Beckers an exclusive right to provide services to fixed-wing aircraft at the Air Park; witnesses questioned whether such an agreement existed flatly denied the proposition. *But an exclusive right may also be created by imposing on outsiders unreasonable standards or requirements.* The lease the City offered Brettman, when compared to the leases it has given the Beckers, made it virtually impossible for Brettman or any applicant for that matter to start a similar business at the Air Park and to compete with the Beckers. This is not a case where the existence of only one enterprise conducting a particular aeronautical activity at an airport is acceptable because the market potential is insufficient to attract competitors; the City had an entrepreneur actively seeking to do business at the airport and representing that he had investors willing to utilize his proposed facilities. At least in Brettman's mind a potential market existed to sustain a competing fixed-wing aircraft service center. *The potential competitive effect of Brettman's operation upon the Beckers' business was an insufficient reason to deny access to Brettman.*

Id. (emphasis added) (citation omitted).

¹⁷⁸ *Id.* "Instead of making its public airport available to the benefits of competitive enterprise, the City foreclosed, by imposing unreasonable standards and requirements, the opportunity for others to enjoy the rights and privileges held by the Beckers." *Id.*

grounds for affirmance, the Court of Appeals for the Eleventh Circuit concluded by dismissing the city's attempted justification that each new provision of what it called its "standard" lease was incorporated to protect the city's, and thus the public's, interests.¹⁷⁹ Although the city claimed that the provisions reflected its desire to learn from experience and to improve the way it does business, the court emphasized that any modifications made in the lease extended to Brettman had to have been reasonable when compared to similar leases offered others *at that time or subsequent thereto*.¹⁸⁰ The court stressed, therefore, that *City of Pompano Beach* should not be interpreted as a signal to cities and potential airport lessees that all municipal leases must be identical.¹⁸¹

¹⁷⁹ *Id.*

The City attempted to justify each of the discriminatory provisions in the proposed Brettman lease, arguing that they were incorporated to protect the City's and thus the public's interests. These justifications, which might have provided an adequate reason for the City's modification of its standard fixed base operator lease over time, were insufficient here, in light of the City's conduct vis-a-vis Brettman.

Id.

¹⁸⁰ *Id.* at 1545.

We applaud a city's desire to learn from experience and to be ever watchful for improvements in the way it does business in order to protect the public's interest; modifications in standard contracts and leases is one way to accomplish this worthy goal. But in this instance the clock stopped for the City of Pompano Beach on May 30, 1979, the date of Brettman's initial request. Any modifications in the lease the City extends to Brettman must be reasonable when compared to similar leases offered by the City to others *at that time or subsequent thereto*.

Id. at 1544-45. The court explained why the city's treatment of Brettman differed from its treatment of the Beckers:

Key to our affirmance of the hearing officer's findings and order is the fact that the City's contemporaneous treatment of the Beckers and Brettman differed so markedly. The City last amended its lease with John Becker and Pompano Air Center in November 1978; Brettman applied for a lease May 30, 1979; the City granted Executive Aviation a lease in July 1979; and the City then granted Brian Becker a lease in November 1981. The differences in these leases have already been noted; we find no reasonable explanation or justification in the record as to why they exist.

Id.

¹⁸¹ *Id.* "Contrary to the City's foreboding warning and admonition, our affirm-

III. PRACTICAL IMPLICATIONS OF THE INTERPRETATION
GIVEN SECTION 1349(A) IN *CITY OF POMPAÑO
BEACH V. FAA*

In *City of Pompano Beach v. FAA*,¹⁸² the Eleventh Circuit held that section 1349(a)¹⁸³ had been violated because Pompano Beach imposed *unreasonable standards* upon Brettman, a lease applicant for airport space.¹⁸⁴ The single most important practical implication of *Pompano Beach* is that it continues a trend towards a very broad application of section 1349(a),¹⁸⁵ and it is the first judicial decision to explicitly hold that the imposition of unreasonable standards is proscribed by the statute.¹⁸⁶

The trend towards a broad interpretation of section 1349(a) began in 1941 with the Attorney General's opinion¹⁸⁷ that section 1349(a), then section 303 of the CAB Act,¹⁸⁸ prohibited the granting of an exclusive right for *each* aeronautical use of an airport.¹⁸⁹ Originally it had been suggested that section 1349(a) might only prevent the grant of an exclusive right if it consisted of the grant of the sole right to use an entire airport.¹⁹⁰ Then in 1972, the FAA published an advisory circular¹⁹¹ which consider-

ance of the hearing officer's findings and order is *not* a signal to cities and potential lessees of municipal property that all municipal leases must be identical." *Id.*

¹⁸² 774 F.2d at 1529. See *supra* notes 1-29 for a discussion of the facts of *Pompano Beach*. See *supra* notes 163-182 for a discussion of the holding of *Pompano Beach*.

¹⁸³ 49 U.S.C. app. § 1349(a) (1982).

¹⁸⁴ 774 F.2d at 1543-45. See *supra* notes 163-182 for a discussion of the holding of *Pompano Beach*.

¹⁸⁵ See *infra* text accompanying notes 187-193 for a discussion of the trend towards a broad interpretation of section 1349(a).

¹⁸⁶ See *infra* text accompanying notes 194-212 for a discussion of why *Pompano Beach* is the first case to explicitly hold that the imposition of unreasonable standards is proscribed by the statute.

¹⁸⁷ 40 Op. Att'y Gen. 72 (1941). See *supra* notes 40-44 for a discussion of the Attorney General's opinion.

¹⁸⁸ Civil Aeronautics Act of 1938, ch. 602, § 303, 52 Stat. 993, 986 (current version at 49 U.S.C. app. § 1349(a)(1982)). See *supra* notes 29-38 for a discussion of the CAB Act, and section 303 in particular.

¹⁸⁹ See *supra* notes 40-44 for a discussion of the 1941 Attorney General's opinion.

¹⁹⁰ 40 Op. Att'y Gen. at 72; see *supra* note 41 for the text of the opinion where this suggestion was discussed.

¹⁹¹ FAA Advisory Circular No. 150/5190-2A (April 4, 1972), *relevant sections re-*

ably broadened the scope of section 1349(a)'s exclusive right.¹⁹² In it the FAA stated that an exclusive right could be conferred by either express grant, *imposition of unreasonable standards or requirements*, or any other means.¹⁹³

Although the FAA announced in 1972 that the imposition of unreasonable standards could violate section 1349(a), *Pompano Beach* is the first judicial decision to expressly so hold. It could be argued that *Aircraft Owners*¹⁹⁴ and *Southwest Airlines*¹⁹⁵ involved claims of imposition of unreasonable standards, but if closely inspected, both cases reveal *express* exclusions and/or discriminations which distinguish their holdings from *Pompano Beach*. For example, in *Aircraft Owners*, it might appear that the take-off fees levied against aircraft operating with a seating capacity of less than twenty-five¹⁹⁶ were "unreasonable standards" which were being imposed. However, the plaintiffs in *Aircraft Owners* did not contend that the fees were in and of themselves unreasonable, but rather that the *fact of their being* was openly discriminatory.¹⁹⁷ The fees were not exacted from *all* aircraft using the airports, and the plaintiffs found this to be objectionable.¹⁹⁸ This distinction is important, because a claim that the fees were unreasonable would have forced the court to subjectively analyze the merits of the fees themselves. Instead, the conduct complained of in *Aircraft Owners*, the "discrimina-

printed in *Alphin v. Henson*, 392 F. Supp. 813, 832-833 (D. Md. 1975), *aff'd*, 518 F.2d 85 (4th Cir. 1976), *modified on other grounds*, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977). See *supra* notes 58-68 for a discussion of the 1972 Advisory Circular.

¹⁹² See *supra* note 64 for a discussion of how the FAA broadened the scope of section 1349(a)'s "exclusive right" in its 1972 Advisory Circular.

¹⁹³ See *supra* notes 58-68 for a general discussion of the 1972 Advisory Circular. See *supra* note 64 for the relevant text of the circular in which this language appears.

¹⁹⁴ See *supra* notes 82-92 for a discussion of *Aircraft Owners*.

¹⁹⁵ See *supra* notes 94-132 for a discussion of *Southwest Airlines*. See *supra* notes 158-160 for a discussion of the Eleventh Circuit's interpretation of *Southwest Airlines* in *Pompano Beach*.

¹⁹⁶ 305 F. Supp. at 96.

¹⁹⁷ *Id.* at 101; see also *supra* note 89 and accompanying text for a discussion of the plaintiffs' claim that the take-off fee was discriminatory.

¹⁹⁸ 305 F. Supp. at 101.

tory" enforcement of the fee, was readily apparent. The court had merely to decide whether the selective imposition of the take-off fees — used to relieve congestion at the airports and to promote safety¹⁹⁹ — was the type of conduct prohibited by section 1349(a).

*Southwest Airlines*²⁰⁰ was a broader decision than *Aircraft Owners*, and is therefore more like *Pompano Beach*. Although Southwest Airlines was not expressly excluded from Love Field and, therefore, no exclusive right was expressly granted to the air carriers who remained,²⁰¹ Southwest Airlines, nevertheless, did not have unreasonable standards imposed against it. It instead complained of an *express ordinance* which arbitrarily dictated what types of air service could remain at Love Field and what types had to be transferred to the new Regional Airport.²⁰² Like *Aircraft Owners*, the conduct complained of was explicit and undeniable — no subjective analysis of "standards" or other conduct was required. In fact, the exclusion of Southwest Airlines from Love Field was as close to being "express" as an exclusion can get: Southwest Airlines was the only air carrier affected by the ordinance,²⁰³ a fact readily ascertainable at the time the ordinance was passed.

Pompano Beach, unlike *Aircraft Owners* or *Southwest Airlines*, did not involve an easily identifiable policy, ordinance, or act that was found to be objectionable.²⁰⁴ Instead, the Eleventh Circuit weighed the facts as whole, stating several conclusions which may or may not have been suffi-

¹⁹⁹ 305 F. Supp. at 106; see *supra* note 93 for the relevant text of the *Aircraft Owners* decision.

²⁰⁰ See *supra* notes 94-132 for a discussion of *Southwest Airlines*.

²⁰¹ See *supra* notes 99-106 and accompanying text for a discussion of how Southwest Airlines was excluded from Love Field.

²⁰² See *supra* notes 99-106 and accompanying text for a discussion of the ordinance and its classification system.

²⁰³ See *supra* notes 99-106 and accompanying text for a discussion of how Southwest Airlines was the only air carrier excluded from Love Field under the ordinance.

²⁰⁴ See *supra* notes 1-28 for a discussion of the facts of *Pompano Beach*. See *supra* notes 144-182 for a discussion of the holding in *Pompano Beach*.

cient by themselves to support a judgment, and determined that the facts indicated *uniquely* unjust discrimination,²⁰⁵ the *intentional* imposition of unreasonable standards,²⁰⁶ and the grant of an exclusive right to the Beckers.²⁰⁷ The distinction between these findings and the holdings in *Aircraft Owners* and *Southwest Airlines* can best be described by language in the *Pompano Beach* decision itself: "[T]he different provisions in the proposed Brettman lease *are not unjustly discriminatory per se* But based upon the evidence in the record, the hearing officer was entitled to find that they were unjustly discriminatory."²⁰⁸ If the take-off fees in *Aircraft Owners* had been found to be discriminatory and in violation of section 1349(a), it would have been because they were discriminatory *per se*. The fact that they were imposed against some aircraft and not others would have made them discriminatory. However, in *Pompano Beach*, the mere fact that the lease provisions offered Brettman differed from those offered incumbent lessees does not seem to have been the key to the court's decision.²⁰⁹ The court emphasized that the provisions not only differed, but *also impaired Brettman's ability to compete* with the incumbent FBOs.²¹⁰ Impairing Brettman's ability to compete — a fact only discovered from Brettman's testimony concerning the impact of the lease provisions on his proposed business²¹¹ — was a discriminatory effect *not readily apparent on the face* of the lease. Therefore, not only was *Pompano Beach* the first case to find a violation of section 1349(a) through the imposition

²⁰⁵ *Pompano Beach*, 774 F.2d at 1543. See *supra* notes 166-169 and accompanying text for a discussion of the uniquely discriminatory effect of the city's conduct towards Brettman.

²⁰⁶ *Pompano Beach*, 774 F.2d at 1544. See *supra* note 177 for the relevant text of the opinion.

²⁰⁷ *Pompano Beach*, 774 F.2d at 1543-44. See *supra* note 169 for the relevant text of the opinion.

²⁰⁸ *Pompano Beach*, 774 F.2d at 1543. See *supra* note 166 for the entire text of this quote.

²⁰⁹ See *Pompano Beach*, 774 F.2d at 1543-45.

²¹⁰ *Id.* at 1543; see *supra* note 168 and accompanying text for a discussion of the effect of the provisions on Brettman's ability to compete at the Air Park.

²¹¹ See *Pompano Beach*, 774 F.2d at 1543.

of unreasonable standards, but the "unreasonableness" criteria was broadly construed. Though the standards were not unreasonable on their face, they were found to be unreasonable in light of the facts of the case.

In conclusion, the single most important practical implication of *Pompano Beach* is that it continues a trend towards a broad interpretation of section 1349(a), and that it is the first judicial decision to explicitly hold that the imposition of unreasonable standards is proscribed by the statute.²¹² Additionally, *Pompano Beach* is an important decision for a few other reasons. First, section 1349(a) has such a scant body of interpretative case history²¹³ that *Pompano Beach* will certainly be referred to in future decisions discussing section 1349(a). Second, since the decision involved a subjective consideration of the facts of the case,²¹⁴ no clear cut standard of conduct emerges. *Pompano Beach* could "open the floodgates" of litigation to plaintiffs seeking access to airport space. With no clear cut standard being evident in the opinion, *Pompano Beach* could certainly be advocated as espousing a much more liberal approach to section 1349(a) than the Eleventh Circuit intended. Finally, *Pompano Beach* involved a fact situation much more common than *Southwest Airlines*, the only other major case finding an implicit grant of exclusive right.²¹⁵ *Southwest Airlines* involved a one time distribution of air service between a new regional airport and the existing municipal airports. *Pompano Beach*, on the other hand, involved a city's reluctance to allow an additional FBO to compete at its airport, the reluctance of incumbent FBOs to give up any of their business, and an applicant for lease space that was determined. True, the FAA's hearing officer found that the city had intentionally

²¹² See *supra* text accompanying notes 183-211 for a discussion of the most important practical implication of *Pompano Beach*.

²¹³ See *supra* notes 73-143 for a discussion of the judicial interpretation of section 1349(a) before the *Pompano Beach* decision.

²¹⁴ See *supra* text accompanying notes 204-212 for a discussion of the court's subjective analysis of the facts in *Pompano Beach*.

²¹⁵ See *supra* notes 94-132 for a discussion of *Southwest Airlines*.

thwarted Brettman's attempts to gain access to the Air Park because it sought to shield the Beckers from competition, but it does not seem that the city's conduct²¹⁶ was overly egregious on its face. Situations analogous to the one addressed in *Pompano Beach* could occur fairly often in the future.

Diane Norwood

²¹⁶ See *Pompano Beach*, 774 F.2d at 1544.

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